Docket No. 81-2332

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, A POLITICAL SUBDIVISION OF THE COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 22, 1982
CERTIORARI GRANTED JANUARY 17, 1983

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DOCKET ENTRIES

UNITED STATES DISTRICT COURT

DATE	NR.	VOL. I PROCEEDINGS
1979		
Oct. 10	1	Complaint.
Oct. 30	3	Answer on behalf of Norfolk Redevelopment and Housing Authority (NRHA).
Dec. 14	4	Answer on behalf of Federal defendant.
1980		
Sept. 24	9	Motion for bifurcation of the issues of liability and damages or in the alternative for an extension of time for discovery on behalf of the defendants.
Oct. 29	12	Order directing that this case is bifurcated and that the trial scheduled for November 25, 1980 is solely on the issue of liability; further should the court decide the issue of liability adversely to the defendants then the matter will be promptly scheduled for a hearing on

		the issue of damages entered October 20, 1980. JAMack, Judge. Copy in lieu of notice 10-29-80.
Nov. 18	13	Order on final pretrial conference entered in presence of counsel November 14, 1980. RBK,Judge.
1981		
Jan. 5		Transcript of proceedings of November 25, 1980.
June 5	16	Memorandum opinion entered and filed June 4, 1981. JAMack,j. Copies mailed by judge's office.
June 5	17	Order denying plaintiff's prayer for relief entered June 4, 1981. JAMack,j. O.B. Copies to counsel by Judge's office.
July 6	18	Notice of appeal on behalf of the plaintiff.
July 14		Record on appeal mailed to U.S. Court of Appeals ($4.50)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

1982

Mar. 25	Opinion
Apr. 22	Order granting Appellees Motion for Stay of Mandate
May 21	Motion of Appellees for Extension of Stay of Mandate
May 21	Order Staying Mandate Additional 30 days
June 18	Motion of Appellees for Extension of Stay of Mandate
June 18	Order Staying Mandate Additional 30 days

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

THE CHESAPEAKE AND POTOMAC
TELEPHONE COMPANY OF
VIRGINIA,

Plaintiff,

v.

CIVIL ACTION
NO. 79-906-N

MOON LANDRIEU,
in his official capacity as
Secretary of Housing and
Urban Development

and

NORFOLK REDEVELOPMENT AND
HOUSING AUTHORITY,

Defendants.

COMPLAINT

1. Plaintiff is a public service corporation organized under the laws of Virginia, engaged in the business of selling telephone service and other telecommunication services in various

portions of the State of Virginia, including the City of Norfolk where approximately seven percent of its total business is conducted. Defendant Moon Landrieu is head of the Department of Housing and Urban Development, a department of the executive branch of the United States government. Defendant Norfolk Redevelopment and Housing Authority is a political subdivision of the State of Virginia operating in the City of Norfolk, hereinafter referred to as "the Authority."

2. This action arises under 42 U.S.C. §§ 4601 et seq. and seeks remedies authorized by 5 U.S.C. §§ 704 and 706 and by 28 U.S.C. §§ 2201 and 1361. The Court has jurisdiction under 28 U.S.C.

§ 1331(a), under 28 U.S.C. § 1361, and under 42 U.S.C. § 1456(1).

3. At various times prior to the removal and relocation of plaintiff's telephone facilities hereinafter mentioned HUD contracted with the Authority to make capital grants pursuant to 42 U.S.C. § 1453 for certain urban renewal projects designated VA R-8, VA R-25 and VA A-1, respectively, each project to be carried out in accordance with an urban renewal plan approved by the City Council of the City of Norfolk for a designated project area within the City.

4. The urban renewal plan for each project required that all or substantially all of the land in the project area be acquired and cleared by the Authority and that the tract of vacant land so created

be subdivided for sale or lease to private purchasers or lessees in accordance with a new or revised plan of subdivision, including a new or revised street plan for the area, for redevelopment in a prescribed manner beneficial to the local community as a whole. Pursuant to said plans the Authority has acquired, and has sold or leased for redevelopment or still holds for sale or lease to redevelopers, all of the land to be redeveloped in said project areas.

5. The land to be redeveloped in each project area included land which, at the time when the urban renewal plan was adopted, then was and for many years had been dedicated to public street use and occupied by existing streets but which would not be so used under the new street

plan for the area. To make possible the acquisition and transfer of complete ownership of such land, unencumbered by the public street easement, each plan provided that the Authority should first purchase or condemn all private property in the project area, including the abutting landowners' title, subject to the public easement, to the land in the streets and their special rights to continued use of the streets, after which the Authority should request the City Council to extinguish the public easement by vacating and discontinuing the streets. In accordance with said plans and by this means the Authority has acquired and sold or leased for redevelopment, or still holds for sale or lease to redevelopers, various parcels of real estate formerly

occupied by streets and parts of streets within each of said projects.

6. In the exercise of franchise rights granted by the City of Norfolk and with the prior consent of the corporate authorities of the City plaintiff had installed many of its telephone lines and appurtenant equipment, all consisting of personal property owned, maintained and operated by plaintiff, in public streets of the city, including streets in said project areas which are not part of the new or revised street plan for the project, with the result that the Authority has acquired and sold or leased for redevelopment, or still holds for sale or lease to redevelopers, numerous parcels of real estate from which it has required that plaintiff remove and relocate its

telephone lines and equipment.

7. At various times since the effective date (January 2, 1971) of the Uniform Relocation Assistance and Real Property Acquisitions Policies Act, 42 U.S.C. § 4601 et seq., plaintiff has moved its personal property from real property as a result of the acquisition of that real property for the projects aforesaid, all of which were undertaken with Federal financial assistance, and as a direct result of projects and programs which received Federal financial assistance under Title 1 of the Housing Act of 1949, as amended. In doing so plaintiff has incurred actual reasonable expenses in the aggregate amount of Six Hundred Eighty-Six Thousand Four Hundred Twenty-Two Dollars and Fifty-Three Cents ($686,422.53).

8. Claims for relocation payments in the aggregate amount aforesaid were properly submitted to the Authority by the plaintiff, in the manner and within the time prescribed by applicable regulations (24 C.F.R. Part 42, §§ 42.1 et seq.) adopted by HUD pursuant to 42 U.S.C. §§ 4633 and 3535(d), and all of said claims have been rejected. On August 11, 1976, the Authority notified plaintiff that all of its claims theretofore submitted (on May 4, 1975, May 5, 1975 and November 19, 1975) "are hereby rejected." On September 9, 1976, plaintiff submitted to the Authority a request for review and reconsideration of plaintiff's claims and for a written explanation of the Authority's initial decision thereon, all as provided for by applicable regulations adopted by

HUD (24 C.F.R. §§ 42.235-42.240.) Plaintiff's claims remained under review and reconsideration by the Authority from September 9, 1976 until August 28, 1978, during which time the original claims were amended and supplemented, on April 8, 1977, to include additional expenses incurred in removing plaintiff's facilities from land acquired by the Authority in the same projects involved in the original claims, and an additional claim submitted August 16, 1977, for expenses incurred in moving plaintiff's facilities from the third project hereinabove mentioned was added and thenceforth included, by agreement between plaintiff and the Authority, among the claims under review and reconsideration by the Authority. Throughout the time when plaintiff's

claims were under review and reconsideration by the Authority plaintiff had assembled and furnished to the Authority all additional documentation and information pertaining to its claims which the Authority at various times and from time to time requested.

9. On August 28, 1978 the Authority issued its final determination on review and reconsideration of all of plaintiff's claims, again denying said claims.

10. The Authority's final determination on review of plaintiff's claims was communicated to plaintiff September 11, 1978. On September 28, 1978 the plaintiff requested review of its claims by HUD, as provided by further regulations (24 C.F.R. §42.245) adopted by HUD. Plaintiff's claims remained under review

by HUD until June 18, 1979, when HUD issued a final determination and decision on review and reconsideration of said claims, setting forth its findings of fact and conclusions of law as required by its regulations (24 C.F.R. § 42.250(a). By said determination and decision HUD specifically found and concluded that plaintiff had moved its telephone lines and equipment from real property acquired by the Authority; that the property so moved was personal property; that plaintiff's property had been so moved as a result of the acquisition of said real property by the Authority for programs or projects undertaken by a Federal agency, or with Federal financial assistance, within the meaning of 42 U.S.C. § 4601(6), and as a direct result of projects or programs which

received Federal financial assistance under Title I of the Housing Act of 1949 within the meaning of 42 U.S.C. § 4637; that plaintiff had filed its claims for relocation payments in a timely manner and had diligently pursued its administrative remedies before the Authority and before HUD. HUD nevertheless concluded that the provisions of 42 U.S.C. §§ 4601 et seq. did not entitle plaintiff to relocation payments for the expense of moving its telephone lines and equipment from land formerly dedicated to public use as the result of the acquisition of that land for the projects aforesaid.

WHEREFORE plaintiff prays for a declaratory judgment adjudicating that plaintiff is eligible for relocation payments as provided for by 42 U.S.C. §§

4601 et seq. for the actual reasonable expenses of moving its telephone lines and equipment from real estate formerly dedicated to public street use as a result of the Authority's acquisition of that real estate for said urban renewal projects; for an order in the nature of mandamus ordering HUD to direct the Authority, in accordance with its applicable regulations (24 C.F.R. § 42.250(c)(3)) to pay plaintiff's claims, with interest from the date of each claim until paid; and for a judgment against the defendants and each of them in the amount of $686,422.53 plus interest computed on each portion thereof embraced in a claim submitted by plaintiff

to the Authority from the date of said claim until paid.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA

By /s/Joseph L. Kelly

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Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,

Plaintiff,

v. CIVIL ACTION NO. 79-906-N

MOON LANDRIEU, etc., et al.,

Defendants.

ANSWER

The defendant, Norfolk Redevelopment and Housing Authority (NRHA), by counsel, responds as follows to the complaint filed herein by The Chesapeake and Potomac Telephone Company of Virginia (C&P):

1. The defendant, NRHA, neither admits nor denies the plaintiff's allegations as to the amount of business it

conducts in Norfolk, but the remaining allegations of paragraph 1 of the complaint are admitted.

2. The allegations of the second paragraph of the complaint are conclusions of law and require no response by this defendant.

3. The allegations of the third paragraph of the complaint are admitted, with the exception that the plans for the projects designated in paragraph 3 of the complaint are called Redevelopment Plans, which are authorized under Title 36 of the Code of Virginia.

4. It is admitted that the Redevelopment Plan for each of the projects designated in paragraph 3 of the complaint required that all or substantially all of the land in each project

area would be acquired and cleared by NRHA and that the tract of land so created would be made available for redevelopment by private or public enterprise. It is denied that the plan required the land to be subdivided for sale or lease to private purchasers or lessees in accordance with the new or revised plan of subdivision, including a new or revised street plan for the area. It is further admitted that property within the project areas was acquired in accordance with the terms of the Redevelopment Plans, and that certain property within the project areas was sold or leased for redevelopment by public or private enterprise and that certain property within each of the projects is still available for disposition.

5. It is admitted that land included

within each project area was at the time the Redevelopment Plan was adopted and for many years prior thereto, dedicated and used as public streets. It is admitted that the new right-of-way plan proposed by the Redevelopment Plan contemplated that some of such land would not be used in the same purposes as prior to the adoption of the Redevelopment Plan. It is admitted that each Redevelopment Plan provided that NRHA should first acquire all private property which was expressly excluded from acquisition according to the terms of the Plan, which acquisition would include, except as so excepted, the title of land owners who abutted public right-of-ways situated within the project area. It is admitted that the Plan contemplated that NRHA would request the Council of the City

of Norfolk to extinguish the public easement in certain streets by vacating and discontinuing the same. It is admitted that NRHA has acquired property situated within the redevelopment project areas and has sold certain property to public or private entities for redevelopment and that some of these parcels of real estate formerly constituted the beds of streets or portions of streets within each of the said projects. Except as hereinabove expressly admitted, the allegations of the fifth paragraph of the complaint are denied.

6. This defendant is not advised as to the authorization under which the plaintiff has installed its telephone lines and appurtenant equipment within the public streets of the City of Norfolk,

including streets situated within or traversing said project areas, and accordingly, neither admits nor denies planitiff's allegations respecting the same. It is admitted, however, that plaintiff has installed certain lines and appurtenant equipment within the right-of-way of certain public streets in the City of Norfolk. This defendant denies that the telephone lines and appurtenant equipment so installed were personal property. This defendant denies that it has required the plaintiff to remove or relocate its telephone lines and equipment from any streets situated within the City of Norfolk. The removal was caused by the closure of the streets, which extinguished the plaintiff's rights to have its lines or equipment situated in the former

rights-of-way.

7. The allegations contained in the first sentence of paragraph 7 are denied. The plaintiff is not advised of the reasonableness of any expenses incurred by the plaintiff and calls for strict proof thereof.

8. It is admitted that the plaintiff submitted claims for relocation payment in the amount of $686,422.53 and this defendant raises no objection to the manner or the time within which such claims were presented. It is admitted that this defendant notified the plaintiff that such claims were rejected.

9. The allegation of paragraph 9 is admitted.

10. The allegations of paragraph 10 are admitted.

FIRST AFFIRMATIVE DEFENSE

11. This defendant denies that the plaintiff, a utility company, is a displaced person or business and, therefore, is entitled to benefits under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1971, 42 U.S.C. § 4601, et seq.

SECOND AFFIRMATIVE DEFENSE

12. This defendant denies that the plaintiff has a sufficiently durable right to the underground location of its lines and equipment to entitle it to benefits under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1971, 42 U.S.C. § 4601, et seq.

THIRD AFFIRMATIVE DEFENSE

13. This defendant denies that the telephone lines and equipment owned by the

plaintiff constituted personal property.

FOURTH AFFIRMATIVE DEFENSE

14. This defendant denies that such telephone lines were removed as a result of the acquisition of real property by this defendant.

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY

By /s/Francis Crenshaw
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. . .

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

THE CHESAPEAKE AND POTOMAC
TELEPHONE COMPANY,

Plaintiff,

v. CIVIL ACTION
NO. 79-906-N

MOON LANDRIEU, Secretary
of HUD, NORFOLK REDEVELOPMENT
AND HOUSING AUTHORITY,

Defendants.

FEDERAL DEFENDANT'S
ANSWER

Comes Now, Moon Landrieu, Secretary of the United States Department of Housing and Urban Development, by his attorneys, Justin W. Williams, United States Attorney in and for the Eastern District of Virginia, and Michael A. Rhine, Assistant United States Attorney, and Answers each

sentence of the complaint as follows:

1. Defendant is without sufficient knowledge or information to form an opinion or belief as to the amount of business that the plaintiff conducts in the City of Norfolk and this allegation is denied. The remaining allegations in paragraph 1 are admitted.

2. The allegations in the first sentence of paragraph 2 constitute a characterization of plaintiff's complaint to which no response is necessary. The remaining allegations are conclusions of law and no responsive pleading is required.

3. The allegations in the third

paragraph of the complaint are admitted, with the exception that the plans for the projects designated in paragraph 3 of the complaint are called Redevelopment Plans, which are authorized under Title 36 of the Code of Virginia.

4. It is admitted that the Redevelopment Plan for each of the projects designated in paragraph 3 of the complaint required that all or substantially all of the land in each project area would be acquired and cleared by NRHA and that the tract of land so created would be made available for redevelopment by private or public enterprise.

It is denied that the plan required the land to be subdivided for sale or lease to private purchasers or lessees in accordance with the new or revised plan of subdivision, including a new or revised street plan for the area. It is further admitted that property within the project areas was acquired in accordance with the terms of the Redevelopment Plans, and that certain property within the project areas was sold or leased for redevelopment by public or private enterprise and that certain property within each of the projects is still available for disposition.

5. Admitted.

6. Defendant is without sufficient information to form an opinion or belief as to the authorization under which the plaintiff has installed its telephone lines and appurtenant equipment within the public streets of the City of Norfolk, including streets situated within or traversing said project areas, and these allegations are denied. It is admitted that plaintiff has installed certain lines and appurtenant equipment within the right-of-way of certain streets in the City of Norfolk. The allegation that the lines and equipment are personal property

is a conclusion of law and no responsive pleading is required. Defendant denies that the Norfolk Redevelopment and Housing Authority required the plaintiff to remove or relocate its telephone lines and equipment from any streets situated within the City of Norfolk, but rather the removal and relocation of plaintiff's lines and equipment was caused by the closure of the streets by the City of Norfolk. It was this action on the part of the City of Norfolk that extinguished the plaintiff's rights to have its lines or equipment situated in the public right-of-way.

7. It is admitted that certain urban renewal and neighborhood redevelopment projects in the City of Norfolk received Federal financial assistance under Title I of the Housing Act of 1949, as amended, 42 U.S.C. § 1453, et seq. The remaining allegations in the first sentence of paragraph seven are denied. Defendant is without sufficient knowledge or information to form an opinion or belief as to the reasonableness and amount of expenses incurred by the plaintiff and they are denied.

8. It is admitted that the plaintiff submitted claims for relocation payments in the amount of

$686,422.52 and defendant raises no objection to the manner or the time within which these claims were presented. It is admitted that the Norfolk Redevelopment and Housing Authority notified the plaintiff that such claims were rejected. Defendant is without sufficient knowledge or information to form an opinion or belief as to the remaining allegations in paragraph 8 and they are denied.

9. Admitted.

10. The allegations in the first and second sentences of paragraph 10 are admitted. Attached to the Answer as defendant's Exhibit A is a copy of the administrative

decision denying plaintiff's claim. The contents of this administrative decision speak for itself. Accordingly, the remaining allegations in paragraph 10 are denied.

The remainder of the complaint constitutes plaintiff's prayer for relief to which no response is necessary.

FIRST DEFENSE

Plaintiff has failed to state a claim upon which relief can be granted.

Respectfully submitted,

/s/Sammy L. Sims

/s/Michael A. Rhine

Of Counsel:

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Regional Counsel

Paul A. Feiner
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. . .

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

THE CHESAPEAKE AND POTOMAC
TELEPHONE COMPANY OF
VIRGINIA,

Plaintiff,

v. CIVIL ACTION NO. 79-906-N

MOON LANDRIEU, etc., et al.,

Defendants.

O R D E R

On motion of the defendants herein it is hereby ORDERED that this case be bifurcated and that the trial presently scheduled for November 25, 1980 be solely on the issue of liability; and it is further ORDERED that should this Court decide the issue of liability adversely to the defendants then the matter will be promptly

scheduled for a hearing before this Court on the issues of damages.

/s/J. A. MacKenzie
UNITED STATES DISTRICT JUDGE

DATE: Oct. 20, 1980

/s/Michael A. Rhine
Of Counsel for HUD

/s/Jack E. Greer
Of Counsel for C&P Telephone

/s/Francis N. Crenshaw
Of Counsel for Norfolk Redevelopment and Housing Authority

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

THE CHESAPEAKE AND POTOMAC
TELEPHONE COMPANY OF
VIRGINIA,

Plaintiff,

v. CIVIL ACTION
NO. 79-906-N

MOON LANDRIEU,
in his official capacity as
Secretary of Housing and
Urban Development

and

NORFOLK REDEVELOPMENT AND
HOUSING AUTHORITY,

Defendants.

ORDER ON FINAL PRE-TRIAL CONFERENCE

In conformity with the Local Rules for the United States District Court for the Eastern District of Virginia relating to pre-trial procedure, it is ORDERED that:

I. The parties hereto agree upon a stipulation in respect to certain undisputed facts as follows:

1. The Chesapeake and Potomac Telephone Company of Virginia (hereinafter C & P) is a privately owned utility company providing telephone service to that portion of the general public who subscribe to its services. The subscribers who reside in Norfolk represent but a fraction of the subscribers of the C & P System, constituting approximately 7% of the total.

2. The term "Relocated Facilities", as used in this stipulation, includes all cables, lines, guys, supports, poles or other equipment or facilities of any kind which

the plaintiff, C & P, has removed from a prior location and for which relocation benefits are being claimed in this litigation.

3. All of the Relocated Facilities had been installed, maintained and operated by C & P within the public right-of-way of certain streets situated in the City of Norfolk as shown on plats marked P/T Exhibit Numbers 2-5 & 11-16, pursuant to rights derived from a franchise ordinance of the City of Norfolk dated April 5, 1898 and marked P/T Exhibit No. 1.

4. Norfolk Redevelopment and Housing Authority (NRHA) adopted and the City of Norfolk approved redevelopment or conservation plans for

Ghent Neighborhood Conservation Project Va. R-43; East Ghent South Redevelopment Project, Va. A-1-1; East Ghent North Redevelopment Project, Va. A-1-2; Rosemont Redevelopment Project, Va. R-25; Downtown North Redevelopment Project, Va. R-8; and Berkley II Redevelopment and Conservation Project, Va-A-1-5, which projects included portions of the streets in which C & P had placed its Relocated Facilities. A copy of the property map for each redevelopment or conservation project is marked P/T Exhibit Nos. 6-10.

5. NRHA acquired land abutting (on both sides) certain of the aforementioned streets all as shown on P/T Exhibit Nos. 6-10.

6. The City of Norfolk thereafter, by the ordinances listed below, closed portions of certain public streets in which the Relocated Facilities had been placed, these portions of the streets being shown on P/T Exhibit Nos. 2-5 and the ordinances being:

(a) Ordinance No. 23,887, adopted by the Norfolk City Council on April 25, 1967, closing certain streets in the Rosemont Redevelopment Project, Va. R-25.

(b) Ordinance No. 24,462, adopted by the Norfolk City Council on July 16, 1968, closing certain streets in the Rosemont Redevelopment Project, Va. R-25.

(c) Ordinance Nos. 26,706 and

26,707, adopted by Norfolk City Council on January 2, 1973, closing certain streets within the East Ghent North Redevelopment Project, Va. A-1-2.

(d) Ordinance Nos. 28,157 and 28,158, adopted by the Norfolk City Council on September 24, 1975, closing certain streets within the East Ghent South Redevelopment Project, Va. A-1-1.

(e) Ordinance No. , adopted by Norfolk City Council on closing certain streets in Berkley II Redevelopment and Conservation Project, Va. A-1-5.

7. Subsequent to the street closures, NRHA has disposed of, dedicated for public use, offered to

dispose of, or has retained for future dedication or disposition all of the land which formerly constituted the street bed of those streets closed by Norfolk City Council and mentioned above.

8. All Relocated Facilities were removed subsequent to January 2, 1971, the effective date of the Uniform Real Property Acquisition and Relocation Policies Act.

9. The net project cost of each urban renewal project involved in this litigation is borne two-thirds (2/3) by the Federal Government and one-third (1/3) by local grants-in-aid. Included in the net project cost of each project is the cost of any necessary relocation of any

municipally owned public utility lines in public streets. When such streets were vacated and closed in accordance with the urban renewal plan the non-betterment cost of such relocation of municipally owned utility lines is eligible under HUD regulations for inclusion in required local grants-in-aid. Under the HUD regulations such payments are not eligible as a relocation cost, but as an eligible cost of site improvement.

10. C & P has, from time to time, and at the request of the City of Norfolk, relocated facilities located on street beds pursuant to its franchise, where such relocation was necessary to accommodate street improvement or alteration. Such action

has been taken at the expense of C & P without any compensation from the City of Norfolk.

11. When in the course of its normal business practices C & P has relocated its facilities from the right-of-way of public streets upon the direction of the City of Norfolk, the cost of such relocation like any other expense has been borne by C & P as part of its operating expenses within the rate structure approved by the State Corporation Commission.

12. The property within the project areas was acquired by NRHA in accordance with the terms of the Redevelopment Plans, and certain property within the project areas was sold or leased for redevelopment by

public or private enterprise and certain property within each of the projects is still available for such disposition.

13. After passage of the several street closing ordinances C & P was not permitted to retain the Relocated Facilities in the former street beds, except on a temporary basis.

14. All work of removal and all work of related reinstallation of the Relocated Facilities was done in accord with plans approved by NRHA and the approximate location of such work is shown on P/T Exhibit Nos. 2-5.

15. The C & P work was begun and completed within the following approximate dates:

Llewellyn Avenue (C & P Est. No.

1304) July, 1972 through January, 1974.

Ghent Area - Westover Avenue, etc. (C & P Est. No. 1677) February, 1973 through July, 1976.

Olney Road (C & P Est. No. 2109) April, 1972 through June, 1974.

Rosemont (C & P Est. No. 2171) March, 1972 through September, 1975.

Berkley Avenue (C & P Est. No. 3327) September, 1977 through January, 1979.

Charlotte Street (C & P Est. No. 1268) February, 1972 through February, 1974.

16. C & P submitted its claims in a timely fashion and administrative remedies were pursued in a proper and timely fashion and have been exhausted

prior to the institution of this suit.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, Plaintiff	]	
v.	]	CIVIL ACTION NO. 79-906-N
MOON LANDRIEU, ETC., and NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, Defendants	]	

MEMORANDUM OPINION

The Chesapeake and Potomac Telephone Company of Virginia ("Telephone Company") here sues the Secretary of Housing and Urban Development ("HUD") and Norfolk Redevelopment and Housing Authority ("NRHA"), seeking reimbursement for the

relocation of its telephone lines, cables, conduits, poles, and related equipment in four federally-aided redevelopment projects in the City of Norfolk, Virginia. The central issue is the applicability of the provisions of the Federal Relocation Assistance Act, also known as the Uniform Relocation Act of 1970 ("URA"), 42 U.S.C. §§ 4601 et seq. The Virginia Legislature has adopted an enabling act to bring Virginia localities under the umbrella of the federal Uniform Relocation Act. See, §§ 25-235 et seq., Code of Virginia.

It is stipulated that the defendant NRHA acquired title to certain blighted areas in Norfolk for the purpose of redevelopment projects; that the land so acquired included streets in which the Telephone Company's lines and conduits

were located; and that in the redevelopment of the areas the Telephone Company was required to relocate its utility equipment in accordance with the plan established for the redevelopment of each pertinent area.

The statutes relied upon in the Telephone Company complaint are part of the Federal Relocation Assistance Act, 42 U.S.C. §§ 4601, 4622 and 4637, and read as follows:

> "4622. (a) Whenever the acquisition of real property for a program or a project. . . will result in the displacement of any person . . . the head of such agency shall make a payment to any displaced person . . . for - (1) actual reasonable expenses in moving himself, his family, business, farm operation or other personal property; (2) actual direct losses of tangible personal property as a result of moving or discontinuing a busi-

ness or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property . . . .

"§ 4601. Definitions. As used in this chapter -

(5) The term 'person' means any individual, partnership, corporation or association.

(6) The term 'displaced person' means any person who . . . moved from real property, or moves his personal property from real property as a result of the acquisition of such real estate, in whole or in part, or as a result of the written order of the acquiring agency to vacate such real property, for a program or a project . . . .

(7) The term 'business' means any lawful activity, excepting a farm operation conducted primarily -

(a) for the sale of services to the public . . . .

"§ 4637. A person who moves or discontinues his business, or moves other personal property . . . as a direct result of any project or program . . . shall . . . be deemed to have been displaced as a result of

the acquisition of real property."

HUD and NRHA, defendants, deny that the Uniform Relocation Assistance Act includes public utilities such as the Telephone Company or that the statutes are to be given the broad reading necessary to encompass the plaintiff's claim.

Concluding that utilities are not included under the Uniform Relocation Act of 1970, we DENY the Telephone Company's request for reimbursement thereunder.

I

In the litigation of situations reasonably akin factually to those presented here, courts have been unanimous in denying such utility relocation claims. Consumer Power Company v. Costle, 615 F.2d

1147 (6th Cir. 1980), held that relocation benefit for a gas main which had to be relocated in a new right-of-way in a redevelopment project was denied; Pacific Telephone and Telegraph v. Redevelopment Agency of Glendale, 151 Cal. Rptr. 68, 87 Cal. App. 3d 296 (1978), under a State Act of the same language as the federal Relocation Act, the court found that a public utility accepts franchise rights in public streets subject to an implied obligation to relocate those facilities at its own expense when necessary to make way for a redevelopment project relieving urban blight. Artesian Water Co. v. State Department of Highways and Transportation, 330 A.2d 432 (Del. 1974), held that the Uniform Relocation Act was not intended to extend coverage to include utilities

within its definition of displaced persons or businesses. Mountain States Telephone and Telegraph Company v. Boise Redevelopment Agency, 607 P.2d 1084, 101 Idaho 30 (1980), stated that the overwhelming view in this country is that public utilities are not entitled to relocation costs incurred in making way for governmentally sponsored projects and the Uniform Relocation Act does not change this common law rule. To like effect, Public Service Company of Oklahoma v. Harris, No. 79-C-37-3T (N.D. Okla., August 22, 1980); Lone Star Gas Company, etc. v. Moon Landrieu, No. 80-100-C (E.D. Okla, March 30, 1981).

These cases are ample authority, upon almost identical factual situations and with the same state and federal statutory

overview that a private utility company is not a beneficiary for relocation expenses under the Uniform Relocation Act of 1970.

II

The common law has long been fully developed that utilities, shielded from competition by a franchise, accept their right to install utility lines in public rights-of-way thoroughly cognizant of their obligation to relocate such lines upon demand at no cost to the City, County or State. No authority for this obligation need be cited.

In Virginia during the period of the conception of the Uniform Relocation Act, the mid-1960's, relocation costs of utility lines, particularly in the expansion of highways, raised a real furor of

intense and vocal interest both to the utilities attempting to collect reimbursement and to the Virginia Highway Department in its disclaimer of liability for such costs. Potomac Electric Power Company v. Fugate, 275 F.Supp. 566 (E.D. Va. 1967); PEPCO v. Highway Commissioner, 211 Va. 745, 180 S.E.2d 657 (1971); Potomac Power Electric Power Company v. Fugate, 341 F.Supp. 887 (1972); Potomac Elec. Power Co. v. Fugate, 574 F.2d 1163 (4th Cir. 1978). This contest was and is part of the public record and was prominently and contemporaneously in the foreground while passage of the Relocation Act of 1970 was before Congress.

In the adoption of the Uniform Relocation Act of 1970 if Congress chose to abrogate such a well known common law

principal, it would certainly have included in that legislation a clear affirmative statement of that revocation. Instead, no such reversal of the common law concept appears in the language of the Act nor its legislative notes and history. So also, in light of then ongoing litigation over relocation costs, had it been the intent of Congress to reimburse utilities for relocation costs in redevelopment projects, it appears that such intent most certainly would have been specifically stated in light of the fact that Congress had passed a special statute, a Federal Highway Aid Act in 1958, to give such relief to utilities relocating lines to accommodate the interstate highway system.

Lastly, public utilities retrieve their operating costs and the reasonable

return of their investment from the general public in their franchise area through rates that are structured to accommodate costs and expenses. No other "persons," "corporations," or "displaced persons," except utilities are so protected by a franchise with a non-competitive market area.

The language of the Supreme Court in Alexander v. U.S. Dept. of HUD, 441 U.S. 39 (1979), indicates the thoroughness of the discussion of the Relocation Act before both the House of Representatives and the Senate Committee. Apparently, many witnesses appeared seeking to enlarge the umbrella of reimbursement to many classes of "displaced persons." No mention is made of any appearances before the Committees of Congress by utility repre-

sentatives. In the end, as Alexander proclaims, the extension of relocation assistance was limited to a fairly narrow group and did not include utilities.

> "The structure of the Relocation Act confirms our conclusion that Congress did not expect to provide assistance for all persons somehow displaced by Government programs." Alexander, supra at page 60.

We believe that it is those unprotected, unfranchised corporations and persons whhich [sic] were contemplated by Congress under the Uniform Relocation Act. A utility company, C & P Telephone Company, serving these redeveloped areas under its franchise is not called upon to compete. Its rates are established by petitions to the State Corporation

Commission which takes into consideration the accounting data essential to the life of the utility and fixes a rate to cover its costs and expenses. On the other hand, a Mom and Pop business, a grocery store, a retail furniture outlet, for instance, which is subjected to the sudden trauma of being forced to relocate elsewhere must do so under competitive conditions in which it cannot realistically raise the price of its products to cover extraordinary relocation costs. It must compete in the market place against competitors beyond the redeveloped area who have no such cost to recoup. These are the "persons," "businesses," "displaced persons," to which the Uniform Relocation Assistance Act extends its largesse.

For the reasons herein stated, the plaintiff's prayer for relief is DENIED.

/s/J. A. MacKenzie
United States District Judge

Norfolk, Virginia
June 4, 1981.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

THE CHESAPEAKE AND POTOMAC
TELEPHONE COMPANY OF
VIRGINIA,

Plaintiff,

v. CIVIL ACTION
NO. 79-906-N

MOON LANDRIEU, ETC., and
NORFOLK REDEVELOPMENT AND
HOUSING AUTHORITY,

Defendants.

ORDER

In accordance with a Memorandum Opinion filed this date, the plaintiff's prayer for relief is DENIED.

/s/J. A. MacKenzie
United States District Judge

Norfolk, Virginia
June 4, 1981.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1602

The Chesapeake and Potomac
Telephone Company of
Virginia,

Appellant,

versus

Moon Landrieu, in his official
capacity as Secretary of
Housing and Urban Development,

and

Norfolk Redevelopment and
Housing Authority,

Appellees.

Appeal from the United States District
Court for the Eastern District of
Virginia, at Norfolk. John A. MacKenzie,
District Judge.

Argued
December 7, 1981

Decided
March 25, 1982

Before HAYNSWORTH, Senior Circuit Judge, RUSSELL and WIDENER, Circuit Judges.

Joseph L. Kelly, Jack E. Greer (Williams, Worrell, Kelly and Greer on brief) for Appellant, Francis N. Crenshaw (Ann K. Sullivan, Crenshaw, Ware & Johnson; Justin W. Williams, United States Attorney, Michael L. Rhine, Assistant United States Attorney; Sonia C. Jaipual, John R. Abbot, Peter M. Campenella on brief) for Appellees.

HAYNSWORTH, Senior Circuit Judge:

The questions are whether a utility company can qualify as a "displaced person" under the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 84 Stat. 1894, 42 U.S.C. § 4601 et seq., and whether the plaintiff, Chesapeake & Potomac Telephone Company (C&P), qualifies as a "displaced person" under the facts of this case.

The Department of Housing and Urban Development (HUD) provided funds for the Norfolk Redevelopment and Housing Authority (NRHA) to carry out certain redevelopment projects in Norfolk, Virginia. In order to carry out these projects NRHA acquired title to certain blighted areas in Norfolk. Because of these pr[illegible]cts, C&P was forced to move certain of its telephone lines, cables, conduits, poles and related equipment from what had been streets in Norfolk. Under C&P's franchise agreement with the City of Norfolk, C&P was required to move its lines from public rights-of-way whenever requested by the city to do so.

After moving its lines, C&P requested relocation benefits under the Uniform Relocation Act. C&P's claims were denied

at the administrative level. C&P then brought this action in the district court against the Secretary of HUD and NRHA.

After a trial on the liability issue, the district court determined that Congress did not intend for utilities to qualify as displaced persons under the Act. The plaintiff appeals from this order.

I.

The Uniform Relocation Act defines "displaced person" or "any person who . . . moves . . . as a result of the acquisition of . . . real property . . . for a program or project undertaken by a Federal agency, or with Federal financial assistance . . . ." 42 U.S.C. § 4601(6). "Person" is defined as "any individual, partnership, corporation or association."

42 U.S.C. § 4601(5). "Business" is defined as "any lawful activity, excepting a farm operation, conducted primarily --(A) for the purchase, sale, lease and rental of personal and real property, and for the manufacture, processing, or marketing of products, commodities, or any other personal property; (B) for the sale of services to the public . . . ." 42 U.S.C. § 4601(7). Under 42 U.S.C. § 4622(a) "displaced persons" are entitled to recover from the government any reasonable expenses incurred in moving personal property, and a business required to move is a displaced person.

The plaintiff argues that it is a business within the meaning of the Act and thus is entitled to claim reimbursement for expenses as a displaced person. NRHA

and HUD argue, however, that the Act was not intended to apply to utilities. HUD bases its argument on the settled common law principle that utilities are not entitled to reimbursement for expenses incurred in moving lines when cities close streets. Because the Act does not explicitly mention utilities as parties that can receive benefits under the Act, and because the legislative history of the Act makes no mention of utilities, HUD argues that the Act was not intended to change the common law. We disagree.

HUD's reliance on the common law is unconvincing. The Act was intended to create rights that were not recognized at common law. A tenant at will, for example, can recover relocation expenses as a displaced person under the Act even

though the common law recognized no such right. The plaintiff in this case is, in certain respects, similar to a tenant at will because it has a right to use the city's streets for its lines only at the will of the city.

Congress' failure to mention utilities during the debates on the Act and in the legislative history of the Act also provides little reason to exclude utilities from the Act's coverage. In Alexander v. United States Department of Housing and Urban Development, 441 U.S. 39, 51 (1979), the Supreme Court noted that the original "Declaration of Policy" is S.1, 91st Cong. 1st Sess. § 201(1969), the bill finally enacted as the Uniform Relocation Act, stated that the purpose of the legislation was

> "to establish a uniform policy for the fair and equitable treatment of owners, tenants, and others displaced by the acquisition of real property in Federal and federally assisted programs to the end that such person shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole."

Similar language is contained in the House Report, H.R. 91-1656 (1970). Thus the Act was intended to extend benefits uniformly to persons who are displaced by federal acquisitions of real property for federal programs. Exclusion of utilities from the Act's coverage would run counter to that purpose.

In the absence of any clear legislative intent to exclude utilities, it is this court's duty to apply the literal language of the statute. Doing so, we

find that a utility comes within the Act's definition of "business" and thus is a "displaced person" under the Act.

II.

HUD contends that the removal of its lines by C&P was not the result of federal acquisition of the real estate. It says that the removal was required by the city's closure of the streets.

Under the statute, relocation expenses are payable if the removal was required "as a result of the acquisition of . . . real property, in whole or in part . . ., for a program or project undertaken by a Federal agency, or with Federal financial assistance . . . ." It is true that the city closed the streets, but the removal seems clearly to have been required as a result of the federal acquisition of the

real estate.

With respect to most of the relocation costs incurred by C&P, they occurred in situations in which NRHA acquired the land abutting both sides of streets. As a result of those acquisitions, the project became the owner of the title in fee simple to the land underlying the streets, subject to the city's easement to maintain them as public ways. At the request of NRHA, the city then released its easements so that NRHA became the owner of the land formerly dedicated to use as streets without the burden of that servitude. While in a very technical sense it may have been the city that closed the streets, the city was acting at the direction or request of HUD and NRHA. It was an essential part of the plan of the

project that the land occupied by the streets to be closed be acquired free of the city's easement so that such land could be incorporated in the redevelopment plan to the same extent as lands acquired, by purchase or condemnation, from private owners. It was the federal acquisition of the streets, an integral part of the redevelopment plan, which required removal of C&P's lines.

Some of the removal expense was incurred with respect to lines in streets that were to be widened and other streets which were only partially closed. The record is not sufficient to permit us to decide whether those expenses resulted in whole or in part from the federal acquisition. This should be the subject to further consideration on remand.

III.

Under 42 U.S.C. § 4622(a), it is the expense of removal of personal property which is reimbursable, and HUD contends that the utility lines were realty. Its regulations required that what is personal property be determined according to the law of the state in which the property is located,[1] and it relies upon Transcontinental Gas Pipe Line v. Prince William County, 210 Va. 550, 555, 172 S.E.2d 757, 761-62 (1970).

In Transcontinental, gas pipe lines had been installed in land which Transcontinental had a perpetual easement for the placement, maintenance and operation of the gas line. The easement was unquestionably real property, belonging to the owner of the lines. Under those

1. 24 C.F.R. §42.40 (m)(2).

circumstances, the Virginia Supreme Court held that the gas lines themselves were real estate belonging to Transcontinental. In so doing, it held that the question whether a chattel annexed to real estate has been converted into a fixture principally depends upon the intention of the party making the annexation.

C&P, in placing its lines, could hardly have intended them to become so annexed to real estate belonging to others that the lines themselves became the real property of those other owners. Clearly it intended to maintain ownership and control of these lines which were not annexed to any real estate owned by C&P of which they might have become a part. Indeed, everyone recognized C&P's right of removal of property which could only have

been its personalty.

In similar situations in which a utility's facilities were installed or attached to real estate belonging to others, state courts have found that the facilities remained personal property. See Bangor-Hydro Electric v. Johnson, 226 A.2d 371 (Me. 1967); United Electric Light v. Deliso Const. Co., 52 N.E.2d 353 (Mass. 1943).

HUD and NRHA, however, point to a letter that C&P wrote to the Virginia Commissioner of Revenue requesting that its property be taxed as real property. That it wished its facilities to be treated for purposes of ad valorem taxation as if they were realty is not inconsistent with an intention at the time of installation that the facilities remain

its personal property subject to its control and possible removal. Indeed, if the facilities had become part of the real estate to which they were attached, C&P should have been subject to no ad valorem taxation upon them, for they would not have been the property of C&P.

This result is consistent with the purpose of the personal property limitation. The former owners of land acquired for the redevelopment project are compensated through a purchase agreement or a condemnation proceeding. By agreement, there might be a severance of a fixture and its reconversion to personalty, but once real estate has been sold and paid for, it is no longer subject to removal by the former owner. The Act thus contemplates no reimbursement of expense in

connection with the removal of non-removable real estate. It is limited to the expense of removal of personal property, for the owner is not otherwise compensated for that expense. There is no possibility of double compensation here, for C&P did not sell any land, and it received no compensation through any sale or condemnation.

We reverse and remand this case for further proceedings consistent with this opinion.

REVERSED AND REMANDED

TESTIMONY OF RICHARD TUCKER

DIRECT EXAMINATION

(TR-29)

BY MR. GREER:

Q. Would you state your name, please, sir?

A. Richard Tucker.

Q. Mr. Tucker, would you tell us by whom you are employed, and in what position?

A. C & P Telephone Company, engineering department. Field engineer.

Q. And back in 1972, 1973 through 1976, what position were you?

A. Same position, sir, except I was in another group which had responsibility for downtown Norfolk.

Q. Now, Mr. Tucker, in connection

with your position with C & P Telephone Company, did you have any connection with the work which was done on what we are calling here the relocated facilities within some Redevelopment, urban redevelopment area?

A. Yes, sir.

Q. Which were those.

A. Olney Road and Llewellyn Avenue, the main two jobs, and part of the Olney Road job was a portion of the responsibility in order to feed Ghent, which was done later.

Q. And I know you don't have it before you--

MR. GREER: If Your Honor please, we have listed on Exhibit 2 for identification on Olney Road, the

C & P number on that is 2109.

THE COURT: You mean of the road itself?

MR. GREER: That's what it is called, Olney Road job project, which we have separate plans on is this portion here. C & P, 2109. And I give these numbers because some of the other exhibits refer to them. Llewellyn Avenue is 1304.

THE COURT: Wait a minute.

You couldn't call it something easy like Llewellyn Avenue job, could you?

Go ahead.

BY MR. GREER:

Q. Then, Mr. Tucker, in connection with other work, did you at my request review the drawings and plans and engineering plans on the other jobs that were

involved?

A. Yes, sir.

Q. What were they?

A. They were Berkley and Rosemont.

MR. GREER: If Your Honor please, those numbers, Rosemont is 2171.

Berkley is 3327.

THE COURT: 2237?

MR. GREER: Excuse me. 3327 is Berkley.

BY MR. GREER:

Q. And did the Ghent area include what has been

(TR-31)

termed the Botetourt Gardens, or West Avenue?

A. Yes, sir.

MR. GREER: That's 1677, your Honor.

THE COURT: And you call that what?

MR. GREER: Botetourt Gardens.

BY MR. GREER:

Q. Now, Mr. Tucker, drawing your attention first to Llewellyn Avenue, as shown on Exhibit No. 3, do the, or what is shown as the old equipment and the old Llewellyn and the new Llewellyn?

A. Well, the old Llewellyn Avenue is the red line. We had an underground conduit run, which is pipes laid in ground so we can pull cables at any time without digging up the ground again with manholes to make access to certain locations along the ramp.

There were in that area pole lines, but they were removed, and this was just part of the job for removal. People

moving out of the houses. And they were relocated to the new Llewellyn Avenue.

THE COURT: What was relocated to the -- the conduit and manholes or the --

THE WITNESS: Conduit, manholes and cables which were in the conduits.

BY MR. GREER:

Q. How is that shown on Exhibit No. 3?

(TR-32)

A. They were relocated into the same type structure, being underground conduit and manhole route along the new Llewellyn Avenue between Princess Anne Road and 19th Street.

Q. Is that shown in green on this No. 3?

A. Yes, sir.

Q. And is the old shown in red?

A. Yes, sir.

Q. All right. And you mentioned that the lines -- can you just describe a little more as to the actual type of lines or equipment that was relocated?

A. Well, underground conduit and manholes are structures that we put on main routes so that it is not necessary to dig up the ground along the main routes within the City. And where we have major cable lines within the conduits, we have normally large cables that run 1 inch to over 3 inches in diameter.

Q. What is within the cables. What do they consist of?

A. Individual wires. Anywhere from 100 to 3600 pairs of wires. 7200 individual lines that feed the facilities to subscribers in a good portion of the

northern area of Norfolk.

Q. How about any pertinent equipment, relays or anything else like that involved?

(TR-33)

A. No, sir. And I don't know if they fell in this particular area. But we have a, what amounts to a VEPCO transformer. They are load coils which enhance the transmission properties of the cable. If they were in that location, they would also have to have been relocated.

Q. Now, in regard to that, with whom did you work insofar as making this relocation and doing the work, getting it replaced and so on?

A. Three people that Norfolk Redevelopment -- the main contacts, Bob Kunkler I worked with more than anybody

else.

****

(TR-33)

THE WITNESS: And Fred Ewell.

THE COURT: Is he with Norfolk Redevelopment?

THE WITNESS: Yes, sir.

And Dennis Richardson, I believe. I don't remember how much contact I had with each individual, but I know Mr. Kunkler was my main contact.

****

(TR-33)

Q. How about any contact with anyone of the City?

(TR-34)

A. No, sir. The only contact that I remember even may have been with the City would have been in a joint preconstruction

meeting that is held prior to all jobs.

Q. Now, Mr. Tucker, in regard to the other job, going first to what has been described as Botetourt Gardens, which is below there, does Exhibit No. 3 show again the work that was done?

A. Yes, sir.

Q. And again, if I may, just to shorten it, the red, does the red show the old work and the green the new?

A. Yes, sir.

Q. And did you review those project plans?

A. Yes, sir.

Q. Now, in connection with that, could you explain to the Court, if you will, and I think if you can show on this, transferring over to Exhibit 2, which gives the complete, again, what was done

and what was made necessary insofar as any work down here in Duke Street, Olney Road. Just tell the Court where?

A. Well, there were two old routes which were on the old Duke Street and Llewellyn Avenue to Westover Avenue.

Q. Is that what is shown in red here?

A. Yes, sir. When those streets were to be

(TR-35)

closed, the property would then have fallen in what was to be constructed as apartments and townhouses and the like. And our existing conduit and cable runs would have then been located beneath those structures. So it was necessary for us to relocate those, and the only way to do it was to construct a new line from Boush

Street down Olney Road to intercept those existing feeder cables and reroute them up the proposed Botetourt Gardens to an intersection of Westover Avenue.

Q. Now, when you described from Boush Street, can you give us a description then if we are talking about what intersection is this? Can you see it from there?

A. That is Duke Street. And we have runs, lines that come down Duke Street and continued on. What is now the red line was the old Duke Street. And we had lines coming down Boush, which continue on to Llewellyn Avenue, which is the right end of the green line.

Q. That's the right end right there?

A. Yes, sir.

And since those lines continue on

to Westover, Duke and Duncan Streets, which were to be closed, and we had to intercept those lines at those two points, the intersection of Llewellyn, or rather Boush Street and Olney Road and Duke Street and Olney Road and relocate them to a new run which intercepted the northern ends of

(TR-36)

the two red lines, which were to be removed.

Q. And can you say whether or not this was necessary to get back to your feeders or your main plant?

A. Yes, sir. Without that we had no way to intercept the existing lines and extend them to what would stay on Westover Avenue.

Q. And then describing, so the

record would have it, from Duke Street down Olney to Botetourt, the old Botetourt Road, or as it turns out, what you mean is we have a little loop there?

A. Yes, sir. That's the new line extended down the new conduit and cable runs that were extended on Olney in order to pick up the existing facilities.

Q. And if we go back to this, this shows the same thing on Exhibit 3, does it not?

A. Yes, sir.

Q. And then the new line is the one running up in Botetourt Gardens?

A. Yes, sir.

Q. Now, I don't think I asked you, but what about going back to Llewellyn Avenue a moment. What happened to the old Llewellyn Avenue?

A. The old Llewellyn Avenue was closed and it's now a portion of Maury High School athletic field.

Q. Then did you also, Mr. Tucker, review for me

(TR-37)

the -- let me ask you this. What type of equipment was involved in what we termed the Botetourt Gardens?

A. It was a similar structure. Underground conduit with cables.

Q. Same type?

A. Same type as Llewellyn Avenue.

Q. Now, drawing your attention to Olney Road, which I believe was the job you were involved in?

A. Yes, sir.

Q. Can you tell us from this Exhibit No. 2, what was the work done on that?

A. Well, the north side, which is the red line of Olney Road, was redeveloped and allowed us no location to extend our lines to the western area around Norfolk General Hospital, because Colley Avenue was going to be rerouted, and it was part of the long range plan, as I understand it, so we were forced to relocate to the opposite side of the street where we had space, under the widening program.

Q. Is this rerouting of Colley shown on this curb black?

A. Yes, sir.

Q. And that was the old Manteo Street that ran in there originally?

A. Right. Yes, sir.

(TR-38)

Q. So your work came down to where?

A. It came down to what is, came down to Manteo, or which is now approximately the middle of the relocated Colley Avenue.

Q. And again, what type of equipment was involved there?

A. All underground conduits which have cable feeding that area of the city.

Q. Mr. Tucker, you also on the -- excuse me. I will put it up here.

A. That's all right. I can see.

Q. On what has been termed the Rosemont job, can you tell us what was done there insofar as the location, and I am again referring to Exhibit 4, and just the same stage, setting the same stage, does the red show the old work and the green the new?

A. Yes, sir.

Q. Tell us, if you will, what type of a job that was out there, and just what occurred, and what type of equipment was in there?

A. There was -- this was a portion of buried cable and aerial. I think the majority of it was buried cable. Buried being the trench is opened in the ground and the cable is directly laid into that trench and covered up with dirt. And there is no conduit involved

(TR-39)

whereby you can replace that cable without having to dig the ground again.

THE COURT: Is that the new work was buried cable?

THE WITNESS: Both, sir. The old and the new.

BY MR. GREER:

Q. By buried cable, again, maybe it is obvious to you, but what is within the cable?

A. It's the same type cable generally as we put in the conduit, is generally a type, or plastic covering on the outside with up to 3600 pairs of wires on the inside.

Q. All right.

A. And this was relocated to the new street, the old streets with the red line, the cables were existing.

Q. Is that Republican Avenue and Edward Street as shown here, and Scranton Street?

A. Yes, sir. They were to be closed and new streets were built -- I can't quite read the name of it. I am not that familiar with the area where the new cable

was placed.

Q. I think that is called East Tanners Creek Drive?

(TR-40)

A. And the one going toward Military Highway is Longdale.

Q. Longdale?

A. We had to relocate onto those two proposed streets in order to maintain our service to the Military Highway area.

Q. All right. And then so the work in green was necessary in order to facilitate or make it operational?

A. Yes, sir. In order to maintain that service.

Q. Then one other and I will get back to general questions. On Berkley, what has been referred to as Berkley, which is Exhibit 5 as shown here, this

way, really, in red and green, again, what type of equipment was involved there?

A. The existing equipment was aerial and it was to be located, or relocated, to be buried, I believe it was direct buried, which again did not include conduits.

Q. That was cable that was buried?

A. Yes, sir. The cables were in the air and we were asked to remove them. The first portion of the job had to be removed because the streets were redesigned and that portion of the triangle on the right hand side were the -- yes, sir. Approximately the corner of Appamattox and Berkley Avenue. A portion of Berkley Avenue was

(TR-41)

closed and our aerial line in that area had to be removed so it wouldn't be in the

street.

Q. I know the term aerial probably is self-explanatory, but what do you mean by aerial?

A. Pole lines which hold the cables running in the air.

Q. Now, with the equipment such as the cable and lines in the cable, is that removable type of equipment, or what?

A. The cables are, yes, sir.

Q. And as a matter of fact, what does the telephone company do when it is moving something like that?

A. The old cable is salvaged.

THE COURT: The conduit -- you don't try to take up any conduit?

THE WITNESS: No, sir. Conduits and manholes. The manholes are broken up and filled with dirt and covered over, and

the conduits are abandoned in place.

BY MR. GREER:

Q. On the cable, is any of it reuseable?

A. Very little of it. It is more expensive to try to maintain the cable in order to remove it and save it than it is to replace it with new cable.

Q. Now, in regard to the terms, you have explained lines and cables and all. What does the term

(TR-42)

central office equipment mean, or include?

A. Central office equipment is switching equipment which is normally a fairly large building, and housing electronic equipment. The newer equipment is electronic, which allows any telephone in the system to be switched or connected

to any other telephone in or out of the city.

Q. And the term, wire lines and pole lines, is that what you have described both as cable or individual lines?

A. Wire lines are the cable, the wires which are inside the cable, 3600 pairs of wires I was speaking of, and the pole lines and aerial are the structure which hold the aerial cable.

Q. Now, insofar as the work which was done, was that in accord with these plans which --

MR. GREER: Your Honor, these are Exhibits 11 through 15, which are the more detailed plans that we tried to translate to these drawings.

THE COURT: Exhibits 11 through

15 are the plans by which the reinstallation was put in. Is that what you are saying?

MR. GREER: Both removal and reinstallation.

THE COURT: Go ahead, sir.

(Plans for removal and installation of cables were marked Plaintiff's Exhibit Nos. 11 through 15, respectively, and received in evidence.) (TR-43)

BY MR. GREER:

Q. My question, were they done as drawn?

A. Yes, sir.

Q. And insofar as implementing the work and doing this work that you

described, generally, and as is shown here, was this all by your working with Mr. Kunkler?

A. Yes, sir.

Q. And approved by the redevelopment authority?

A. Yes, sir. Through contractors, Baldwin & Greg -- McGaughy, Marshall & McMillan, architect on Llewellyn Avenue, I believe it was.

Q. Who did the drawing?

A. They did the detailed plans, because they were doing the road jobs in those areas, and in order to minimize conflicts and location of cables and conduits, we hired them to also locate our facilities.

****

(TR-44)

Q. Is the term station equipment, does that --

A. Station equipment is small wire, individual wires and telephones which are in the individual residence or business. It relates to telephone sets and the wiring in the house.

****

CROSS-EXAMINATION

(TR-45)

BY MR. CRENSHAW:

Q. Now, the telephone company follows things like public notices about redevelopment projects; does it not?

A. Yes, sir.

Q. And if you see one of those, isn't it your practice to call the authority and find out what the proposals are?

A. We stay in pretty close contact with them.

Q. And you say in this you hadn't contacted the city very much. Do you contact the city at all about these plans, or about street closures?

A. Normally the cities plan for closing a

(TR-46)

street is in advance and we hear from them before we know of it any other way.

Q. So the city contacts you directly when they propose to get ready for this?

A. Yes, sir.

Q. And that's a routine thing. You always get that notice?

A. Yes, sir.

****

(TR-47)

Q. If the city, for example, has a project that it is widening the street, or changing the grade of a street, is it unusual, or an usual occurrence that you would be contacted and asked to accommodate your lines to whatever new work the city was doing?

A. We would be contacted. There is a, in my job, I think it was 8 years, I don't remember a case where we had to, for the city, relocate anything. We had very

(TR-48)

minor adjustments of conduit runs.

As I remember, we have always been able to work out some method by which the work could be done without a great expense.

Q. But if it was done, the telephone company did bear that expense?

A. Yes, sir.

****

(TR-49)

Q. So the telephone company owns all the lines that are talked about here?

A. Yes, sir.

Q. And would you say these are transmission lines as opposed to local distribution lines?

A. The majority of them are local distribution lines.

Q. You say that the local distribution lines -- but that would mean as far as -- the location means the whole northern part of the city of Norfolk?

A. Yes, sir.

Q. Far beyond the confines of this redevelopment project area?

A. Yes, sir.

Q. That would be true for all of the lines we are speaking of?

A. Yes, sir.

Q. Now, when you put those lines in the conduit, say along Olney Road, along Llewellyn, did the authority

(TR-50)

grant an easement to the telephone company for this?

A. Yes, sir.

Q. So that before this work you were in the right-of-way, so to speak, under your franchise?

A. Yes, sir.

Q. But afterward you had an easement of your own?

A. Yes, sir.

Q. So now you have a vested property right to be where you are?

A. As I remember, that's true.

MR. GREER: I think he is asking a legal question there. He can ask him what he did, but --

BY MR. CRENSHAW:

Q. With respect to that line, can you tell me what it is that you had to do to lay the conduit? For example, do you have to dig a trench?

A. Yes, sir. A trench is dug for the length of the project.

Q. About how deep and how wide is that trench?

A. Basically we maintain two feet, try to maintain 24 inches of cover from the ground level to the top of the structure. The structure being the conduit and cables.

Q. Now, the structure that you

mentioned, can

(TR-51)

you describe how that -- suppose it was, say a 16 pair, is that a proper term, cable?

A. It was a 16 way conduit.

Q. 16 way conduit?

A. Yes, sir.

Q. What does that mean?

A. It means that basically, unless we have problems, we would place 16 individual pipes side by side and one over the other to form approximately a 4 x 4 pipe way.

Q. All right.

A. And this would be laid in the ground to whatever depth it was necessary to maintain two feet of cover.

Q. Now, if you came along, and

suppose there was a water line that crossed the path that you wished to follow, what would you do about that?

A. We would have to dip under the water line.

Q. And about how deep would you go on occasion for that?

A. We try our best to maintain one foot of separation.

Q. So you go to whatever level was necessary to get under that line?

A. Yes, sir.

****

(TR-53)

Q. The conduits are pipes as such, and they are normally four inches in diameter on the inside diameter.

Q. Made of what?

A. They are made of -- what we use

now is plastic.

Q. Now, is this the way the -- excuse me. Go ahead. So that you dig a trench?

A. Yes, sir.

Q. Do you put anything at the bottom of the trench?

A. Depends on the, putting in the footing in the trench. If the soil is good, we don't need any base. If it's a very poor soil, we have to use some type of base.

Q. Some type base?

A. Yes, sir.

Q. To support your pipes?

A. Yes, sir, to keep it from changing in elevation.

Q. How long is each one of these pipes?

A. The ones we use normally come in

sections of 20 foot lengths, I believe.

Q. How are they connected?

A. They are connected by glue, the plastic is.

(TR-54)

There is a glue which is put around the outside and just placed together, and the glue holds very quickly.

Q. Now, say if you were having say a 20 conduit, or whatever you call it, 20 pipes?

A. 20 way.

Q. Do you have say 5 of them piled 4 deep, or 4 piled 5 deep, or sort of symmetrical like that, or laid out flat?

A. No, sir. Fairly square unless we come to an obstruction.

Q. And you lay the pipe in a trench maybe on a base, or not, depending on the soil?

A. Yes, sir.

Q. And you put those in and connect them together, I suppose?

A. Yes.

Q. Do you put anything in there to hold them down or to make it more rigid or --

A. No, sir. The only time we put, we encase them in concrete, if it is necessary, and this would be if you are crossing a roadway where there may be a strength needed to support some kind of large, heavy structure.

****

(TR-55)

Q. Now, how long do these series of 20 foot pipes extend? Where do they go, for example? What starts and stops along that line?

A. There are manholes all between the locations, and the distance between the manholes are designated due to length of cable. We can -- it is only economical to order cable in designated lengths, depending on the size of the cable we would need. If we used a larger reel to place the cable on, we would need special equipment to handle it.

Q. Okay, So that what you do then, you would have a certain, at periodic intervals you would have a manhole. You referred to these as a structure. Could you give me a rough dimension of that kind of structure?

A. Yes, sir. The basic manhole, unless for some reason it had to be larger, is approximately 12 feet long and 6 feet wide and 7 feet deep on the inside.

(TR-56)

Q. That is made of what kind of material?

A. Concrete.

Q. So is it just, in layman's terms, like a big septic tank, or something like that?

A. Yes, sir.

Q. Give you that kind of impression?

A. Yes, sir, with an access hole through the top.

Q. And what did you do, dig a hole and drop that in?

A. Depends on the location. If it is undisturbed land, no utilities in the area, we have what is called precast concrete holes, which come in sections, in halves or thirds. And you can dig the holes, support the hole, smooth out the

trench as such, and drop the hole in and put it together. If you don't have that situation, where the utilities in the city won't allow it, then we have to do what is called pouring in place. The sides are structured up with wood, and the concrete is poured in place in those open spaces to maintain the walls.

****

(TR-57)

THE WITNESS: Well, 14 feet is basic. 10 feet probably would be closer to the average hole.

BY MR. CRENSHAW:

Q. I said it the wrong way. Ten feet is lateral, not up and down?

A. No, sir. 7 feet deep.

Q. And 12 feet long and 6 feet wide?

A. Yes, sir. And the walls or roof and floor of the manhole is approximately a foot.

Q. A foot thick?

A. Yes, sir. That's two feet.

Q. And then you got the pipes you got to put in and cover them back up with dirt, or something like that, to protect them?

(TR-58)

A. Yes, sir.

Q. And there is about a 2 foot layer over that?

A. Yes, sir.

Q. How do you get them into the manhole?

A. There are open -- windows, we call them, made into the sides of the hole at whichever direction the conduit is to be entered.

Q. So now if you have two manholes, and pipes between them, you are set, but

if you don't have any line in there, how do you get the cables in there?

A. That's what the pipes are for. It maintains an open air space when the manhole and a line is fished through this conduit, which may be an average of 2 to 500 feet in length. Some longer, some shorter. And a piece of wire is pushed through the pipe, which gives us the ability to pull through a large cable.

Q. Now, these cables that you pull through, is there one cable in each of the four inch pipes, or more than one?

A. Depends on the size of the cable. There is a possibility that more than one could be. But in the urban city, normally what we call full size cables are placed in each conduit.

Q. I understood you earlier to say that the cables vary from 1 inch to over 3 inches?

(TR-59)

A. Over 3 inches, yes, sir.

Q. If you put in one over 3 inches, that's the only thing you put in a four inch?

A. Yes, sir.

Q. But if you put in a smaller one, you would put more than that?

A. It is possible.

Q. Once you put that thing in there, what is the ordinary life of that cable?

A. 40 years.

Q. 40 years?

A. Yes, sir.

Q. When you put it in there, do you pull it out to service it or anything like

that?

A. No, sir.

Q. During that 40 years?

A. No, sir.

Q. So you put it in and expect it to stay there that length of time?

A. Yes, sir.

****

(TR-61)

Q. So once you get the line, the trench dug and the conduit pipe laid in it, and the manholes connected, and then you pull the line through, then that unit is set and you don't expect to go back into that unit unless you have some kind of trouble. Would that be fair to say?

A. Not always just for trouble. We may have got like in the Ghent area where houses are, apartments, whatever, are

being built, and we may have to go into that piece of cable in order to gather pairs for that subdivision.

Q. So you might have to increase the amount of service that's available?

A. Yes, sir.

Q. Now, the telephone company has quite a long

(TR-62)

range planning activity; does it not?

A. Yes, sir.

Q. And in that, don't you have estimations of population movements within the community such as Norfolk?

A. Yes, sir.

Q. And don't you spend a lot of time trying to estimate where subdivisions are going to grow and people are going to move and that kind of thing?

A. Yes, sir.

****

Q. Would it be expected that the telephone company would inquire as to the number of houses that would be expected in the Ghent Square area?

A. After we find out there is going to be redevelopment, yes, sir.

****

(TR-63)

But whenever the plan was adopted, at that time would it have been normal to expect an inquiry from your company to the Housing Authority as to what redevelopment activities were expected in that area?

A. Yes, sir.

Q. Do you remember such an inquiry having been actually made?

A. We received a letter saying there was going to be street changes in that area.

Q. And did you find out how many homes they expected to build in that area?

A. An estimate.

****

(TR-65)

Q. Now, those number of ducts, would they be what the company estimated as necessary to serve the projected development of the area say between Olney Road and 21st Street?

A. No, sir. It would maintain service much further beyond that. We have to serve areas further north in the city.

Q. But they would include that in the planning?

A. Yes, sir.

Q. So whatever projected growth that you had reason to believe might occur, you would crank into the sizing of the facilities that you put into the streets?

****

Q. Now, the cable that you put in would be sufficient to serve about how many years in advance?

A. The cables, we try not to extend our cables beyond ten years. But when a cable is necessary, we size

(TR-66)

the cable for a 10 years growth.

****

Q. You wouldn't pull out the old ones and put in a new one, would you?

A. Not unless it was a very small cable or there was something wrong with it.

Q. So basically when you put them in there, they are in there to stay?

A. Yes, sir.

****

(TR-69)

A. This, and I am not familiar with this type of drawing. It's not the type work we normally do. This, as I understand it, is mean low water. And this is measurements from that point. This is ground level. So we are in essence about two to two and a half feet below ground level.

Q. The top part, the highest part of your pipe is about two and a half feet below ground level?

A. Yes, sir.

****

(TR-72)

A. Yes, sir.

Q. Up in the upper left-hand corner there is a drawing with a lot of little circles in it that it indicates, proposed 18 duct plan?

A. Yes, sir.

Q. Is that the way your 18 ducts are lined up for that line?

A. Yes, sir. Called stacking.

Q. Stacking?

A. Yes, sir. We stack one over the other in this manner.

Q. Would that indicate that 18 ducts were carried from Olney Road, on up from Olney Road manhole to

(TR-73)

the manhole of Boissevain Avenue?

A. Yes, sir.

Q. Now, you continue through that

same thing up to a manhole at Raleigh Avenue?

A. Yes, sir.

Q. And then another one up to the manhole shown in the right-of-way of Westover Avenue?

A. Yes, sir.

Q. So that the top part of this drawing and the back part of Exhibit No. 12 explains the location from a plan as looking down from an airplane on your plan?

A. Yes, sir.

Q. Now, the bottom part of this drawing is sort of on a graph paper and shows a wavy line. What does that purport to do?

A. That's a profile which gives the depth of the proposed structure, the

conduit.

Q. Okay. Now, why is it that it goes up and down so much?

A. The reason it looks the way it does here is because of the manholes - in order to enter into the manhole, the top of the manhole is approximately already two feet below ground level and the entrance into the manhole itself must be approximately midway of the entire opening, which is about 7 feet. So the conduit has to dip

(TR-74)

down to that location in order to end up in the manhole.

****

(TR-75)

Q. Okay. Now, do these drawings show you the approximate dimensions of one

of these groupings of ducts? For example, 18 pair of duct, about what size is it in the ground?

A. I have to figure it out. Each one of them is a little better than four inches outside dimension. Add three of them it would be 12 with 3 inches of concrete around it. So it would be around 14 to 16 inches wide and probably 3 feet deep or so.

Q. Okay. That was the conduit pipes and concrete inside of it?

A. The concrete is on the outside for extra support of the conduit.

Q. Now then, these plans would tend to show those things for each one of the projects, would it not?

A. Yes, sir.

Q. And they probably would actually

have the dimensions of the conduit if we needed it. I mean, precisely?

A. Yes, sir. A summary on the right-hand side of each one of the drawings which list the detail measurements and numbers of the individual types of

(TR-76)

material that was used.

Q. Okay. So that for the Llewellyn Street relocation here, the things that you did were you constructed in the green line the manholes, the conduits, and then later put the cables into it?

A. Yes, sir.

Q. Okay. Did you take anything out of the red line?

A. Yes, sir. We pulled the cables out.

Q. You pulled the cable out?

A. Yes, sir.

Q. But the rest of it you left alone?

A. We knocked the tops off of the manholes and we have what is called a frame and cover which gives us access to the manhole. You can see the grills in the streets and along the sides. Those are removed. The collars are knocked off, which gives us the 2 foot depth to the top of the hole. The roof of the hole is normally knocked off, filled up with sand or some compactible material and abandoned under the ground.

Q. So the only thing pulled out is the cable?

A. Yes, sir.

Q. What was done with that cable?

A. They are junked.

Q. Junked?

(TR-77)

A. Yes, sir. And we had salvage value for the copper and lead in the cables.

****

(TR-80)

Q. Okay. Now then, with respect to Olney Road, which is best shown on Plaintiff's Exhibit No. 2, Olney Road was never closed, was it?

A. No, sir.

****

Q. Now, why was it that the plant was moved from the northern side of Olney Road to the southern side of Olney Road?

A. Redevelopment requested that they

no longer wanted us on that side of the street due to what was both in and what was going to be in that area, as I remember, and that we had no way to reinforce the conduit on that side of the street and maintain service for what was projected as growth in the hospital area and beyond.

Q. When the Authority communicated that to you,

(TR-81)

you were in Olney Road under a franchise issued by the city?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. Why then would you move because the Authority asked you to move?

A. It was all part of the project.

Just normal way that we have of doing the project at that time.

Q. And you knew City Council approved the project?

A. Yes, sir.

****

(TR-83)

Now, if you were just substituting for this line, could you have just put the green line from that manhole down the southern side of Olney and brought it up to this manhole here if you were simply substituting?

A. Substituting?

Q. I mean, if you were simply relocating this line southwardly and not doing anything else?

A. With no regard to the rest of the project.

Q. No regard to anything else except that line?

A. Yes, sir.

Q. You could have simply moved it down?

A. Yes, sir.

Q. But you didn't do that?

A. No, sir, we couldn't.

Q. Why couldn't you?

A. We had to maintain service to the remainder of the City which flowed over the old Duke Street, Duncan and Westover Avenue, which was being closed.

Q. So that your overall service requirements or transmission requirements required you to do differently on the southern side of Olney Road than was necessary simply by the movement of the northern line to the southern line?

A. Yes, sir.

(TR-84)

Q. Okay. Now, did you have more ducts in there, or fewer, or the same number, or do you know?

A. In the new line as opposed to the old? Yes, sir. We placed more.

Q. Did you crank in, in your consideration of the new line along Olney Road, did the fact that the medical center with the projected employment of some 11,000 people, did that have anything to do with your estimation of how much cable to provide?

A. Not cable. Conduit, yes, sir.

****

Q. Okay. And here again, you would use as much information as you had about the various parts of the City that were

going to grow, or not grow, in determining how much conduit to lay, because you don't want to go back later and put it in, do you?

A. That's right.

Q. So you knew you would have to put in more conduit than you might need, rather than less?

A. We hoped we didn't spend the extra money, or nothing, but we try not to be too low.

Q. You mentioned, I think, that your cable

(TR-85)

requirement is based on a ten year projection. Is your conduit requirement based on a longer projection than that?

A. Yes, sir.

Q. About how long?

A. It depends on economics and what we feel like the change of the area is going to be. We try to put in the downtown area what we feel like is going to last us indefinitely, because it costs so much to go in the ground.

Q. When you order the cables to go into these new lines, about what is the lead time for the preparation of one of those?

A. The cable is ordered by lengths due to not being able to cut the cable between manholes. And we have to have a single piece of cable between the two manholes, so it has to be manufactured as we order it. And therefore the ordering period to shipment is approximately three months for large size cables.

Q. So that when you get ready to do

these things, you know exactly what kind of cable you are going to put in each of the conduit, and you order that and put it in?

A. We don't order it. We make up the projected plan when we are dealing in brand new conduit runs, but don't actually order the cable until the conduit is actually in place. We may run into obstructions in the

(TR-86)

ground and we have to move a manhole. So if it is relocated, that length of cable would not be usable at that location. So we don't acutally order it, to manufacture it until we have verified the lengths between the manhole.

****

(TR-94)

REDIRECT EXAMINATION

BY MR. GREER:

Q. Mr. Tucker, in regard to being asked about the lines and what they were serving as far as the local areas of Norfolk --

A. Yes, sir.

Q. And you gave us in categories of type of lines that would be used in that way, or are there certain categories such as direct service and trunking service and toll, and so on?

A. We have approximately -- we have basically three types service, talking about exchange cables which serve the individual customers who are within a geographic area, a given central office where the switching equipment is located.

We have trunking cables, which is

considered to be those cables which tie our individual central offices together, which give you the ability to dial from one section of the City to the other.

And we have toll cables, which are those

(TR-95)

cables which switch from the main central office, in this case down on Bute Street, to other cities to get us out of the immediate area.

Q. Do you know in these projects like Llewellyn and the others, out of the number of cables that you described, and so on, how many would be total?

A. Total cables in the entire job?

Q. Yes.

A. 12, 14.

Q. And that's all the jobs you are

speaking of?

A. I am speaking of the Ghent, relocation of Llewellyn Avenue, Westover and Ghent and Olney Road.

Q. Out of how many total?

A. All of those I think that was involved, approximately 12 to 14 cables. I would have to go back to the prints.

Q. I said, how many total altogether when you include the trunking and the others. Is there any way of --

A. I don't know. I believe we have probably 18 cables, or maybe better in Llewellyn run when the job started.

Q. All right. Now, of those 18, what I am getting at, of those 18, how many there would be a toll?

A. Out of the 18, how many would have been

relocated?

Q. No. How many would be toll?

A. Toll. Excuse me. I misunderstood. The toll cables, as far as I can remember, there was only one toll cable in there. That went to Newport News.

Q. But going back, this would still, in this relocation, to get the service being relocated, this was all necessary to put that type of service in, was it not?

A. Yes, sir.

Q. Now, you were asked about a term, about when you first went into there, before some maybe streets actually closed or after they were closed, but before the project was reopened, about an easement. Actually that was under a letter of right

of entry; was it not?

A. I don't remember the terms, sir.

Q. You do not?

A. No, sir.

Q. And you may not have -- did you ever see this letter, and this is Exhibit 28 A, which has not been introduced yet. I don't know if you can -- did you ever see this letter from the Authority to Mr. Pittman?

A. No, sir. He worked in the group which was responsible for the toll and trunking, and I wasn't involved with it.

Q. All right. Now, in the cable that you

(TR-97)

described, without going through the description again of running anywhere from 1 inch to 3 inch, that can be removed

from the conduit, can it not?

A. Yes, sir.

Q. And --

A. Not in a workable condition, normally.

Q. This is what I am getting at. And in regard to that, what do you do if you have trouble in that cable? Say if you take -- let's take a run from one manhole of 500 feet, and you got 1 inch or 3 inch cable, and you have a complete breakdown of it, for instance?

A. Complete breakdown, we would place a complete cable in a spare conduit and cut the two ends around to what would remain, and pull the old cable out, disconnect it and pull it out. Every case is individual.

There may be a case where it is

determined that you might dig outside of the manhole, or locate the trouble at some distance between the manholes and dig up the area and repair the cable and leave it in place. It would be much more economical to do that.

But if the damage was so severe that that couldn't be done, the cable is removed and replaced.

Q. All right. And when you use the term junk, you made a distinction between junk and salvage, and I am not sure on that. What is the engineer on the C & P terms,

(TR-98)

what do the two mean?

A. Most of it, when I think about salvageable cable, it is cable that can be reused. Junk cable cannot be reused. It

is cut up and junked and we get a value from that cable, depending on what it is.

Q. These -- maybe I might have misused the term salvageable. But you use the term differently. You do get the value of that?

A. We have a salvage value of the cable.

Q. Material value from it?

A. Yes, sir.

Q. And did, in fact, on these, did you pull the old cables out on these jobs?

A. Yes, sir. There are very -- I have no idea if we ran into this. I don't remember. They are very isolated cables. Due to the condition of the conduit, it is impossible to remove the cable. When that can't be done, we just leave them.

Q. Now, insofar as why you do not

reuse cables, say if you had one for a certain run and it had been there two years, but you pull it out for relocation, or whatever, why do you not use that?

A. Basically due to differences in measurements from one manhole and the handling costs. It would have to be wrapped back up on another reel and sent back to the

(TR-99)

storeroom and stocked in the storeroom until such point that you would be able to use it.

But normally a new conduit structure such as these in the city, we probably follow the manhole sections between manholes, or longer than what was existing, so the cable wouldn't be reusable.

Q. And insofar as the projection, you were asked about that -- and planning ahead is what I mean by projection, for population, or use, and so on. I think you used the term of a ten year growth. What were you speaking of there in regard to, or what are the limits of growth when you figure on a cable?

A. When a cable -- when it is determined that a cable is to be placed in any area, we size that cable to last a minimum of two years, and when it looks like the point will be more than ten years, then economic studies are made to verify whether or not that size cable should be reduced or not.

Normally when you get beyond ten, or at least fifteen years, the economics of the job are such that you would place a

smaller cable rather than run the expectancy life over that time.

Q. That runs from 2 to 10 then, generally?

A. Yes, sir.

Q. Are you familiar with the term "betterment?"

(TR-100)

A. Yes, sir.

Q. And what is that?

A. Betterment is that amount of cable or conduit that is placed in to a new location when an old smaller cable or conduit is removed. Betterment is over and above the in place replacement, existing replacement.

Q. All right. For maybe what a layman or non-engineer calls improved facility?

A. Yes, sir. It would be improvements if you have 500 pairs of cable and you were to replace it and put 1,000 pairs in, then the extra 500 would be betterment.

Q. Now, insofar as the -- you said you pull out the old cable. When, in actually doing the job, what would be the sequence of that? Do you get everything replaced? Do you cut if off, or what?

Just give the Court a little idea of that.

A. The first thing is the manholes are constructed to verify that we have them in a usable location. And the conduit is placed between the manholes, new cable is pulled in those sections, and then the new cable is cut at either end into what is going to remain, and the old

cables are pulled out. The old conduit, or the old manholes are covered up and the job is completed.

Q. But does the service continue?

A. The services always continue.

(TR-101)

Q. Then, insofar as the -- are they included in these, this type of material with what went in here -- I think the term pedestal I have seen used. Are any of the above ground locations -- I don't mean above ground.

A. I don't remember any pedestal work being done. Generally with buried cables of smaller sizes.

Q. Then you were asked specifically, on Olney Road, what was the, insofar as the "Olney Road job", the start of where it extended, and you said to the manhole

at Duke Street, right?

A. The Olney Road job.

Q. Olney Road job?

A. The Olney Road job started --

THE COURT: 400 feet east of the first one; didn't you say?

THE WITNESS: That was the first manhole. The conduit, actual job started on the west corner of Olney and Duke Street.

BY MR. GREER:

Q. Okay. Then I notice we do have both on this plat, and on the No. 3, I think it is, one behind here, again, you have some further work which is on to Virginia Beach Boulevard and a little bit south on Duke Street. What work was that as far as "job" is concerned? What was that in connection with?

(TR-102)

A. That was in connection with the Botetourt job where the cables had to be intercepted, that were now on Boush Street. The Boush Street cables fed on to Llewellyn Avenue a little further down by the Center Theater. But those had to be intercepted and there was no conduit available to intercept the cables at that time. So the conduit had to be placed between Boush Street, and the conduit where we stopped on the Olney Road job which was the west side of Duke Street.

Q. There that work appears on the "Botetourt Gardens" job?

A. Yes, sir.

Q. In regard to what you described earlier, station equipment, you remember that?

A. Yes, sir.

Q. You said that it would involve handsets and so on. What about what the handsets go to? What is the overall inclusion in station equipment?

A. Well, in the broad sense, everything includes station equipment. It would be telephones, and the wires in residences and businesses, which could include up to as large as a PBX.

Q. What is a PBX?

A. That's a private branch exchange switchboard with extensions from that switchboard to different rooms

(TR-103)

in the building, which may be as many as 1,000.

Q. You are talking about in businesses, depending on the size, varying

sizes?

A. Could be very large, yes, sir.

Q. Is that equipment property of the telephone company?

A. Yes, sir.

Q. And if a business moves or changes service, is that removed by the telephone company?

A. Yes, sir.

Q. And how about in the central office equipment, or switching equipment, I believe you used the term, you described that earlier. Is that type of equipment -- what if you change, say, from one office to another location, tear down one building and build another?

A. Equipment is removed.

Q. And removed to the other location?

A. Normally, new equipment is put in at the new location before the other can be removed.

Q. But it is removable equipment?

A. Yes, sir.

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TESTIMONY OF ROBERT R. KUNKLER

DIRECT EXAMINATION

(TR-104)

BY MR. GREER:

Q. Would you state your name, please, sir?

A. Robert R. Kunkler.

Q. By whom are you employed?

A. Norfolk Redevelopment and Housing Authority.

Q. What capacity?

A. I am a registered engineer in the Commonwealth of Virginia, and engineer for

the Authority.

Q. All right. And were you serving in that capacity back in the early 1970s?

(TR-105)

A. That is correct.

Q. And are you familiar with the work, without my detailing each and every one of them, the redevelopment work that was done in the Ghent area?

A. Yes, sir.

Q. And in the Rosemont area?

A. Fair. Pretty much in the Rosemont area, yes.

Q. And also the Berkley area?

A. Yes, sir.

A. Now, in regard to that, there are certain exhibits that have been prepared by Mr. Crenshaw's office being --

MR. GREER: These are the ones in

the book, Your Honor. 6, 7, A and B, and 9, which are called property maps.

BY MR. GREER:

If I may, Mr. Kunkler, just so the record will show these, I don't know if you helped prepare any of them or not, of the certain ones that have some colored areas, and Mr. Crenshaw can correct me if I am wrong, abutting certain of these streets involved?

A. Yes, sir. That's right.

Q. But insofar as the maps themselves, the dotted lines that are shown on the map would be the project lines; are they not?

(TR-106)

A. That's correct. In certain areas X'd, not to be acquired.

Q. That was my next question. We

have shown these for certain emphasis, Mr. Crenshaw did, but the rest of the property within these exhibits as shown within the dotted line would be property in fact acquired by Norfolk Redevelopment and Housing Authority, all except those that have the hash mark X's through them, is that correct?

A. That is correct.

Q. And this one I am showing you here is 7 B, which is East Ghent from 15th Street up Llewellyn Avenue up to 20th Street. And the same thing then would be --all right. This X, for instance, this big parcel, that I believe is Maury High School?

A. That is correct.

Q. That indicates that that was not acquired?

A. That is correct.

Q. And the same thing if we looked at Exhibit 7 A, we would find some parcels scattered around that literally have the hash mark X in it?

A. That is correct.

Q Then within the --

THE COURT: As luck would have it, I look at Exhibit 6 and that's got a piece that's even marked with green on it. It has an X in it. Does that mean it wasn't

(TR-107)

acquired?

THE WITNESS: I didn't notice that, Your Honor.

MR. CRENSHAW: If Your Honor please, I can answer. It was acquired. It was X'd because it wasn't shown on all

the exhibits and that shouldn't have gone in the Court's exhibit, simply because it didn't abut any of the streets involved.

THE COURT: All right, sir.

MR. GREER: One thing the stipulation doesn't show, they have colored only abutting certain streets for emphasis on that. But that's not the only land they acquired.

THE COURT: All right.

BY MR. GREER:

Q. Now, Mr. Kunkler, in regard to the overall project and program then, this land was acquired by Norfolk Redevelopment and Housing Authority?

A. Yes, sir.

Q. And the plan was to then, after certain things had been done, to turn it over for private development, or any other

type development, such as apartment houses, or whatever, isn't that correct?

A. That is correct. And certain public reuse.

Q. And in connection with that, the plan was to

(TR-108)

close certain streets and areas in order to have the property available for such use?

A. That is correct.

Q. And which specifically would include like Duncan and Duke, so that that area can be remapped and restructured, so to speak, for any type of new buildings and so on going in there?

A. That is correct. As a matter of fact, the Duke Street area was a low area. It was probably filled in, and it had to

be refilled and whatever when the road was closed, street was closed.

Q. And in the start of these projects, as with all the projects under this urban renewal, you would have an agreement with the City that looked forward to closing certain streets as petitioned for by the Authority in order to accomplish this plan; is that correct? And that in fact was done here?

A. Yes, sir.

Q. In doing that, the Norfolk Redevelopment and Housing Authority had no intention of ever allowing the C & P Company to keep their facilities in the old places, I will call them, that we see marked by red, did they?

A. I don't know whether I can answer that question specifically. I think the

problem was that normally if we could facilitate them with, allow them to

(TR-109)

stay, for whatever reason, then that was determined when we met with them, for whatever reason. But to move them per se, just because we had to move a road, or for whatever land we used, we normally work very closely with them, and if their plant can stay, for whatever reason, we allow it to stay.

Q. But when you say for whatever reason, in the redevelopment that you want to do in order to have the land and build on it, and not over facilities, and so on, then there is no intention of allowing C & P to keep any equipment there where it was at odd purpose or interferred with such redevelopment; was there?

A. That is correct. In one portion, perhaps, north of Princess Anne Road to Shirley Avenue, that was designated for residential use. But is could have been possible, possibly, that in the area that was an additional area created for Maury High School, there was an athletic area not to be built upon that, perhaps that line could have stayed.

Q. But it in fact did not stay. It was moved from Llewellyn to the new one?

A. At the option, as I recall, of C & P.

Q. Well, was that not at the option of the plan worked out with the Redevelopment Authority?

A. In our meetings, yes, sir.

(TR-110)

Q. And I don't mean that just one

day you say come in and go out. All this is planned?

A. Yes.

Q. And you participated in the planning?

A. Yes, sir, I did.

Q. And that was part of the plan to relocate those facilities, was it not?

A. That is correct.

Q. Now, also the Authority recognized that C & P, when they made these changes, that they had the right to and in fact did pull out all the old cable and any type of equipment like that?

A. Correct.

Q. So in all the planning and in talking there was never any question or contention made that any of that became the property of the Redevelopment

Authority?

A. Not to my knowledge, no.

Q. Were you familiar with the letter, not written by you, Mr. -- no, written by Jack Shiver.

Well, let me ask you this. When this work was being done and the Authority had the line, had the land, did the telephone company have permission to be running these lines in before they became streets?

Did they have permission from the Authority when it was your land?

(TR-111)

A. They may have. I don't know the exact time sequence on the various particular streets. Normally, the streets were closed in a sequence. Prior to relocation of utilities, normally the problem

of maintaining not only the telephone company but other utilities that were still in place became a factor with our coordination of all these closures with City agencies, Department of Public Works, Department of Utilities to maintain in this particular case maybe certain structures that were still on line, water and sewer and et cetera.

Q. So as to the exact time of closure, normally the roads would not be legally closed until certain property were acquired. Is that what is meant by the term, right of entry?

Q. For the C & P to do their work?

A. In some cases, yes, sir.

Q. And this is all in conjunction with the overall plan?

A. That is correct.

Q. And I believe, and you participated, on behalf of the Redevelopment Authority, and working with C & P as you indicated with others, but C & P that we are interested in having any of these relocation plans and facilities conform with what the Authority wanted in, and that would fit in with the project?

(TR-112)

The Authority and the City. Subsequently the City was a final approval on all of our project improvements?

A. Right, because the normal sequence of events, all projects have to be ultimately reviewed and signed off by the City.

Q. But also in that process, they are viewed and in effect signed off or approved by the Authority?

A. Well, yes. We are the coordinating agency.

Q. Was it also recognized in relocating the facilities from an engineer's standpoint they would have to be connected to a means to make them operational, that is to any existing facilities, or by means of bringing it back to the central locations and so on so they would be operational?

A. I worked very closely with Richard Tucker on coordinating the phases of the construction and how the conduits would be made and laid and how they would be relocated, and at what times, in our construction of the roads and utilities.

Q. And on the Olney Road area, which is Exhibit 2, Manteo Street was closed, was it not? That's the street run down

where the new Colley is indicated on here?

A. I believe it was between the two blocks north of Olney Road. I think it is Boissevain and Raleigh.

(TR-113)

From Raleigh south to Olney. I believe that was closed, or portions of the roadway were.

Q. Portions pretty much as shown here?

A. Yes, sir.

Q. This is not necessarily right to scale, but did the Redevelopment Authority acquire land along the south side for parks and so on on Olney Road?

A. Yes, sir, we did.

Q. And you also had the land within this project area on the north side, too?

A. We didn't acquire that. That

particular project is called the conservation project, and it doesn't mean that the land inside there is to be acquired. Only certain portions that warrants clearance, for whatever reason. In the way of a new road, or whatever. But for the most part, that is a conservation area and the properties are not to be acquired.

Q. That's on the north?

A. Yes.

Q. North side. But on the south side you did acquire?

A. We did acquire certain strips along Olney Road, yes, sir.

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CROSS-EXAMINATION

(TR-114)

BY MR. CRENSHAW:

Q. Mr. Kunkler, you mentioned

cooperative efforts or conferences. Did you meet with other agencies, representatives of other agencies in connection with the street relocations?

A. Yes, sir, we did. We normally meet with all pertinent City agencies to review the plan for their approval, since the roadway will be their ultimate responsibility.

For instance, the Department of Public Works, utilities, the other utilities that we normally contact would be, again, Virginia Electric and Power Company. Talk to fire alarm people for any circuits that would transit the project.

Q. You were sort of acting then as liaison or lead agency for the reconstruction of the streets?

A. That is correct.

****

(TR-115)

Q. With respect to the City, was the City constantly and thoroughly informed of new street patterns and new street locations?

A. Absolutely.

Q. Were consulting engineers hired in connection with the new streets?

A. Yes, sir.

Q. And do you remember the names of them?

A. Normally in this particular area we had Baldwin and Gregg responsible for the design of Olney Road within the boundaries of this particular project here. R-43, Ghent Conservation.

For the areas to the north,

Llewellyn Avenue and Botetourt Gardens, we engaged the services of McGaughy, Marshall & McMillan to do the design of project improvements.

Q. When those engineers would do the engineering work for the streets, would they also deal with the placing of the utility lines?

A. Utility lines? Concerning water and sewer, yes, sir.

Q. What about the private utilities such as the telephone company and VEPCO?

A. Normally, we were the coordinating agency for that. And the normal circumstances, we would furnish

(TR-116)

copies of the preliminary drawings and meet with the various utilities from time to time to inform them where we were, our

schedules for construction, and normally utility companies would engage and do their own design and put their own plan in a timely manner to fit our schedule of project improvements.

And in this particular case, due to the nature of the project and multitude of underground lines, the telephone company, in this case, opted to engage the services of each of the engineers to coordinate the design of the underground duct banks, to facilitate the underground construction of the ducts, to coordinate the work, to speed it along more smoothly.

Q. So the plans produced by the consulting engineers showed the street locations and the details of the street, and also the utility location for C & P and VEPCO?

A. That is correct. But the funds for the design of the duct banks were a separate contract by the telephone company.

Q. All right. Now, do you know whether copies of those plans were sent to the Authority?

A. Yes, sir, they were sent to us.

Q. Were they sent to the City?

A. To my knowledge, they were, but I can't --

(TR-117)

Q. You weren't involved in that?

A. No, I was not.

Q. With what department in the City did you work in connection with this?

A. I worked very closely with the Department of Public Works and Department of Utilities.

Q. Okay. Now, with respect to the Olney Road work, do you recall whether Virginia Electric and Power Company was involved, as well as Chesapeake and Potomac Telephone Company?

A. Yes, they were involved also.

Q. In relocating the line?

A. That is correct.

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TESTIMONY OF DAVID RICE

DIRECT EXAMINATION

(TR-125)

BY MR. CRENSHAW:

Q. Mr. Rice, would you please state your name and your title and your job description for the Court?

A. My name is David Rice. I am Executive Director of Norfolk Redevelopment and Housing Authority.

(TR-126)

Q. And what does the Executive Director do at the Housing Authority?

THE COURT: Don't ask him that. I mean, after all, that is to be condemning, probably.

Go ahead. Nothing.

THE WITNESS: I am responsible for the basic administration and running of the Redevelopment and Housing Authority under the direction of the Commissioners.

BY MR. CRENSHAW:

Q. Mr. Rice, are you familiar with the Ghent Neighborhood Conservation Project, East, West, North and South Redevelopment with Rosemont and with Berkley, two conservation and redevelopment projects?

A. Yes, sir.

Q. Could you explain to the Court in general terms the process that is followed in the adoption of one of the projects, plans for such a project such as the Ghent project?

A. Yes, sir. This is a little bit different process in the case of a conservation project which the Ghent project is. That really starts with the City of Norfolk asking the Redevelopment and Housing Authority to investigate the area because it is deteriorating, and to conduct a study to see if it is feasible to rehabilitate the majority of the properties in the project.

(TR-127)

The Authority undertakes that study, investigates the buildings as to their condition, their structural

soundness, whether or not we think that basically through private means the buildings can be economically rehabilitated and brought back really to modern day standards.

Q. And with respect to Ghent, what was your conclusion as to that?

A. Well, the conclusion in Ghent was that it was possible. A program was developed to accomplish that, which really included two things.

One, the preparation of a set of standards for rehabilitation that were higher than the normal City minimum housing codes which were adopted in the plan. And also the construction of numerous public facilities needed within the project area, either because current facilities were out of date and needed

repair, or needed replacing.

Q. With respect to Ghent, can you itemize some of the public improvements that were installed?

A. Yes. Olney Road was totally rebuilt between a relocated Colley Avenue, and in the museum in the vicinity of Llewellyn Avenue, all of the streets, and in the neighborhood were resurfaced. New landscaping was installed where landscaping was missing on any of the streets. A number of parks were built, some along the

(TR-128)

south side of Olney Road. One at the corner of Manteo Street and new Colley Avenue.

Colley Avenue was relocated. The Hague was dredged. The old Hague bridge

was completely rebuilt and a completely new lighting system was installed throughout the entire project area.

Q. Do you have an recollection of the gross dollar expenditures involved in the Ghent project?

A. If I could refer to some notes here.

We made a total of approximately $4.8 million in rehabilitation loans to assist property owners in rehabilitating the property. Some of that involved grants. Some involved local loan funds that were developed through local banking institutions, and some involved federal 312 loans.

We estimate that the private investment that took place was well over $4.5 to $5 million as a result of some of

these other things that took place, and the public improvements were well over $4 million.

Q. Now, the funding scheme for that involved local and federal money?

A. Yes, sir. This was approved under the urban renewal program in which the federal government agreed to pay 2/3 of the cost and the City basically agreed to pay 1/3 of the cost.

(TR-129)

Q. Was the 1/3 that the City paid all in cash, or how was that handled?

A. Virtually all of it was handled through the installation of public improvements, although I would have to relate that to other projects to explain it properly. All of the projects that the City and Housing Authority were involved

in were all pooled together in terms of amount of federal money involved and local money involved.

If the City -- the City was capable of putting up 1/3 share through the construction of certain public facilities like streets, schools, parks and so on. And in the total scheme of things, the City's investment in public facilities far exceeded 1/3 share. So by the time we got to this project, we were virtually using federal money to build the public improvements that took place.

Q. And the federal money came directly to Housing Authority, not to the City?

A. Yes, sir, at this time.

Q. Now, with respect then to the adoption of the plan, and so forth, was

that -- did the City have any involvement in the plan itself?

A. Yes, sir. The development of the plan involved both people in the City and various City departments, and it involved the neighborhood itself, very

(TR-130)

strongly. And in the end when the plan was actually adopted, it was adopted by our Commissioners and by the City Council of Norfolk.

Q. And were the public hearings held in connection with that?

A. Yes, sir.

Q. Now, with respect to the East Ghent North, and East Ghent South, they are redevelopment projects. Would you -- was the general scheme of adoption or formulation of the plan approximately the

same?

A. I would say the general scheme is the same. Basically the conclusion of the studies we did in there was that the properties could not be rehabilitiated and the only alternative that exited for trying to correct the situation, because of the condition of the buildings, and to a great extent also the condition of facilities in the area, such as old schools, worn out utilities and so on, that the area had to be totally acquired and cleared and rebuilt.

Q. Okay. Now, in the Ghent Conservation Project, the acquisition would be only on a selected basis, as opposed to a general acquisition in East Ghent North and South projects?

A. That's generally true for the

project. There was a part of Ghent Conservation Project basically

(TR-131)

west of relocated Colley Avenue that was totally acquired.

The remaining part of the project, unless it was being acquired for the widening of a street or for a park, acquisitions only took place were property owners refused to rehabilitate the property.

Q. Now, turning your attention to the land that is south of Olney Road, extending from Colonial Avenue eastwardly, the property right at the corner and then the property between Colonial and Botetourt, was that acquired by the Authority?

A. Yes, sir.

Q. And for what purpose?

A. For public park purposes, which also accommodated the street widening on the south side.

Q. Now, across the street to the north would be -- strike that.

Were the properties directly across on the north side of Olney Road acquired?

A. Yes.

Q. And coming back to the Hague and Stockley Gardens, was the property on the north side of Olney Road acquired there?

A. (No response).

Q. Now, that would start with the block where Christ and St. Luke's Church is and extends easterly along

(TR-132)

there?

A. The corner property at Colonial was acquired, but nothing else, to the best of my knowledge.

Q. All right. And on the south side, was that property acquired?

A. Yes, sir. All of that.

Q. And was that also for a park?

A. Yes, sir. And the widening.

Q. Then going back to the redevelopment plans and the East Ghent North and East Ghent South, were those plans developed in conjunction with the same City departments and same City officials that you mentioned before?

A. Yes, sir.

Q. Did that involve the planning commission as well as the public utilities and public works departments?

A. And in the school system, and the

Department of Parks and Recreation. I have to add to that list when you get into the actual development of the total plan.

Q. Then how does the -- there would be certain local obligations with respect to the project. You mentioned they had to pay 1/3 share, or provide for it. Was there any document or agreement between the City and the Authority respecting those obligations?

A. Yes, sir. There was always a cooperation

(TR-133)

agreement prepared for every redevelopment or conservation project which basically set forth how the 1/3 share of the City would be met.

Q. And that was in every project there would be a disagreement between the

City and the Authority with respect to those things?

A. Yes.

THE COURT: I don't know if it makes any difference, but so I can keep it straight, do I understand that the City doesn't necessarily put up cash, it gets a credit for whatever work is done for streets and schools?

THE WITNESS: That's exactly what is was.

BY MR. CRENSHAW:

Q. With respect to the East Ghent North and South project, that was a clearance project, I understood you to say?

A. Yes.

Q. And in that, was the new street pattern laid out in that area?

A. Yes. That area really basically within the boundary shown on the map was completely, 99 percent acquired and cleared. As some of the other testimony mentioned, there were areas in it that flooded. Areas that had to be raised. Completely new utility systems. Sewer, water, so on, were installed. And new utilities,

(TR-134)

private utilities installed, based on the overall plan for the whole neighborhood.

Q. Now, with respect to that, do you see Llewellyn Avenue was in pretty much the same location but it was bowed. Do you know why that was changed, that location?

A. Yes, sir. It was moved to try and increase, or to increase the size of

the Maury High School site which originally was between the street that is shown there and DeBree, and was about as small as three acres at one time, and that was part of a program to bring that up to a reasonable standard for an in-city high school. It still does not meet new standards for new construction as far as the state is concerned, but it got it close to 20 acres.

Q. How did you determine, or how was it determined that a new street pattern, or where the new streets would go. How did they come about?

A. Well, beyond some of the through streets, and by through streets I mean things really serving more than just the project area like Olney Road and Llewellyn Avenue and Princess Anne Road. Decisions

in connection with those were closely worked out with the City's Department of Public Works, as to size, width, traffic movements and so on.

(TR-135)

Within that framework of streets, most of the, although all the street plans had to be approved by the various City departments, how those things were arranged were really a function of what we were going to try to get built within the project area.

Q. You speak of, we were going to get built. Does that mean the Authority contracted for and handled the construction of the streets?

A. Yes, sir.

Q. Do you know why it was that the Authority did it, as opposed to the City

building the streets?

A. Well, it was part of the credit system that I just mentioned where the said cities, the amount of money that the city had in credits exceeded what their 1/3 share was, so in this particular project and in a number of others we actually contracted for the work, for the design of them and construction, rather than having the City do it as a credit toward the project which they didn't need to do. So this was actually the use of direct federal money to build the streets.

Q. By doing that you didn't have to use local city funds to do it?

A. That's right.

Q. Was this a result of the credit that resulted from construction of Scope?

A. Yes, that was a large part of it.

Q. Now, going back to the impact, can you give us some kind of quantifiable statistics or facts of the impact of these projects, say East Ghent North and South projects of this construction on the City?

A. Yes. If I could use some of these notes. There were approximately 1,330 families and individuals in the East Ghent North and South project.

As part of the project, we demolished 710 structures. That included about, 1,600 dwelling units. Relocated 79 businesses, relocated a total of 1,232 families, all of which had to be relocated into decent, safe and sanitary housing. And we installed over $10 million worth of public improvements in the streets and utilities and parks and all the other

things that we talked about, within the two, within the project area.

Before redevelopment, taxes to the City for just the Ghent Square area of the project, which is the area west of Llewellyn, between Colonial and Olney and 20th Street in the north, the tax was about $97,000, adjusted for today's rate. Current taxes, with only about 30 percent of that area built out, are about 150 percent of that, or $243,000.

And the projected build out would be about $800,000 or 720 percent increase.

(TR-137)

So we have moved the -- we have done away with the conditions that existed. Families have been relocated into good sound housing, and as far as the new development is concerned, there is a

tremendous return to the City.

Q. You mentioned the conditions that existed, and phrase, decent, safe and sanitary housing. Was that the kind of housing that existed before the project? What kind of housing was that before the project?

A. Yes, sir. It was largely frame construction, very much deteriorated. Old, not being taken care of. And in our opinion could not have been rehabilitated.

Q. And that would be true for the entire section North and South, East Ghent North and South?

A. As a total, yes.

Q. Now, with respect to the Rosemont project, this was a redevelopment project. Were the approval procedures the same as it would be for East Ghent North and

South?

A. Yes, sir.

Q. Now, this map, or this Exhibit No. 4, goes only as far as Johnstons Road. Actually was there some more of project above that?

A. Yes. It continued up between Chesapeake Boulevard and Military Highway, almost to Little Creek

(TR-138)

Road.

Q. That entire area was cleared?

A. Yes, sir.

Q. And then was it rebuilt in stages?

A. The first -- yes, the first area built was the area from Johnstons Road north.

Q. What kind of housing was in there

before this clearance program?

A. It was probably the worst housing of any project, as far as its physical arrangements, and so on. The platting in there was very poor. Ownership was unknown, in many cases. There were a number of trailers. There were a lot of units that had no plumbing, had no hot water and bathroom facilities, and so on.

Q. Now, since that time, how has it been developed?

A. It has been developed predominately in housing. Again, there have been provisions made for the expansion of one of the schools that was in the area, Rosemont Jr. High School, which was in the middle of that map. We reserved other sites for future schools, expansion, other than those things, and a very limited

amount of commercial, done predominately in new housing units, for a large mixture of families at different incomes, ranging from public housing all the way up to

(TR-139)

conventionally financed townhouses and single family homes.

Q. Do you have any figures available on the tax impact before and after in that project?

A. Yes. There have been about a little over two thousand units constructed in the project area, with only about 750 of them there before the project was ever started. It was a fairly low density situation. The taxes before redevelopment were $52,000, and after redevelopment this year, $758,000, or 1,400 percent increase. The total project cost $8.7 million. And

we went through the same, you know, relocation process that I just described in the other projects. Now then, just briefly into the Berkley project.

Q. That is redevelopment and --

A. Yes, sir. And some conservation.

Q. With respect to Exhibit 5, we show in red and green the new C & P Telephone Company plant, where the areas to the left of those two -- those pieces of zipaton, whatever they are called, that red and green, was that area cleared?

A. Yes, I think with the exception of one church, existing church.

Q. Do you know -- strike that.

Has there been any redevelopment in the

(TR-140)

project area?

A. Yes.

Q. What is that?

A. In that area, one section, a low income housing project has been built along Liberty Street on the left-hand side of the area you are talking about.

Q. Okay.

A. That's just on the area you were just talking about.

Q. Yes, here. Anything built up in here?

A. Well, part of that area, or the majority of it, part of it is existing church, which is going to expand, and the other part is going to go into a park, and there is the Southside Boys Club has a facility under construction on that site right now.

Q. And the Southside Boys Club would

be south of Culpepper, and west of Berkley?

A. Yes, sir.

Q. In the vicinity of Craig Street and Mahone Avenue?

A. Yes.

Q. Okay. Now, Mr. Rice, did you personally -- were you personally involved in the negotiations with the telephone company or VEPCO in the negotiations concerning the relocation of their facilities, where they would go in

(TR-142)

the new site, and that sort of thing?

A. I am sure from time to time I was in meetings with representatives of both companies. I was much more involved in the development planning for the projects than I was in details of working out where everyone had to go in order to make them

work, which was handled primarily by engineers.

Q. And that would include Mr. Kunkler?

A. Yes, sir.

Q. With respect to planning aspects of it, was the City constantly involved or advised with respect to that?

A. Yes.

Q. Would their representatives be in attendance from time to time at these meetings?

A. Yes.

****

CROSS-EXAMINATION

BY MR. GREER:

Q. Mr. Rice, in the planning then that you were involved in, do I take it from your answer you didn't get down to

the details of where certain things were to go, or not? Is that what you meant, or did you?

(TR-142)

A. That's what I meant.

Q. But insofar as the total concept of what was to be done with the land, how it was to be used, you were involved in that?

A. Yes, sir.

Q. And in regard to that, where the streets were changed and taking Ghent -- well, let's take the other one. On the closure of the streets such as Duncan and Duke and Llewellyn, and then the new work that was put in, in regard to those, when the new work was done, with the Authority having acquired the land, was that a right of entry that was given to the telephone

company to put those in until they were rededicated for streets?

A. Well, in some cases that might have been done. I am sure the record could be produced to show that where the facilities had to be put in in order to retain service, and so on, and the basic new street plan had been agreed to by all those involved in the City, and so on, and C & P was ready to move on their installations, we may have given them the right of entry. I don't remember them one by one.

Q. That would be because you then owned the land, and for them to do it --

A. And had not yet been dedicated?

Q. Are you familiar with their right of entry

(TR-143)

letter? I referred to it earlier -- I

don't know if you were in the court -- which is a March 22, 1973 letter from Jack Shiver who was then the executive director, or if not the specific letter, you are familiar with that procedure?

A. Yes, I am familiar with the procedure.

Q. All right.

A. I can't say as I remember this specific letter. I was probably involved in it.

Q. But with that outline, what I am getting at, that is the procedure followed by giving this, "right of entry" until the rededication of the street. That would be what was followed?

A. Yes.

Q. All right.

MR. GREER: I would like to have

that marked then, 28 A, 14. Letter of March 22, 1973 to C & P from Norfolk Redevelopment Authority.

BY MR. GREER:

Q. Mr. Rice, I take it from your testimony in relating the scope and some of the costs and investments, that these projects could not or would not have been undertaken without the federal money, with the approval of the Federal Urban Renewal Program, is that correct?

A. I would say they would be very difficult to do without federal assistance, if not impossible.

(TR-144)

Q. Mr. Rice, during the course of these proceedings, going through the administrative part and all and on into today, were you made aware through the

Redevelopment Authority and HUD, specifically the comparable claim that was made by C & P Telephone Company in West Virginia?

****

A. Yes, I was made aware of it. I can't tell you on what date or time.

BY MR. GREER:

Q. That was for relocation facilities, was it not?

A. Yes.

Q. And were you made aware of the disposition of that?

A. What do you mean by disposition?

Q. After the suit was brought against HUD and the West Virginia Redevelopment Authority?

****

(TR-145)

Do you know what happened, or anything about it?

THE WITNESS: I do know what happened.

BY MR. GREER:

Q. What?

A. I don't know, again, at what point in time. I think I found out at lunch today.

THE COURT: You found out this morning. Lunch today.

BY MR. GREER:

Q. What happened?

A. It was settled.

****

TESTIMONY OF ROBERT R. KUNKLER

DIRECT EXAMINATION

(TR-146)

BY MR. CRENSHAW:

Q. Mr. Kunkler, you have heard Mr. Greer question concerning a right-of-way or right of entry granted to the telephone company, and he has shown Mr. Rice, and has been introduced into evidence as Exhibit 20 A, a letter dated March 22 to the telephone company from Mr. Shiver.

Now, you take your time and look at that, and I would like to ask you if you are familiar with that and the circumstances that led up to that letter?

A. Yes, sir, I am basically familiar with the letter.

Q. How did that happen to be written, if you know?

A. You mean the need for the right of entry letter?

Q. Yes.

A. Excuse me. Primarily because I

think due to the timing of our projects, and the construction under way, the streets had not been rededicated. Normally there --

(TR-147)

sometimes there is a time lapse between closures of streets and rededication of new rights of way necessitating a legal vehicle for the utilities to reenter and do necessary construction.

Normally when streets are closed, the City reviews the plan of ongoing construction and construction that may be phased later, to answer my questions the City may have as to drainage problems, sewer and water problems, and how these will be utilmately fulfilled or satisfied.

Q. Okay. Now, this was a right to come in on a temporary space as expressed

in that letter?

A. That is correct.

Q. Earlier we talked about whether the C & P had an easement along Llewellyn Avenue and Olney Road. Did they have an easement for their facilities along those two streets, or either of them?

****

(TR-151)

BY MR. CRENSHAW:

Q. So they ended up with additional easement?

A. Yes, five foot easement. Now, going back a bit to the plans to relocate the lines, what agency met with you, or attended meetings that you attended concerning the proposed relocations?

A. You mean initially?

Q. Start from the beginning and

bring us up quickly.

A. Initially when the plan was formulated we met with all agencies from the City, Department of Public Works, Department of Utilities, and officially notified the utility departments like VEPCO and C & P that this was

(TR-152)

a preliminary plan that we had, and asked them to review the new road systems as planned, and to give us feedback as to what problems would be encountered. The review agencies normally in the City would be for the most part Public Works, and Department of Utilities to let them know, and to get their concurrence on what utilities would be relocated, what problems existed in the site as to drainage, sewage problems, and in this particular case on

Duke Street, there was a pump station, sanitary sewage pump station that had to be relocated. And it was items of this nature that were reviewed, coordinated with the City agencies.

****

TESTIMONY OF GEORGE W. AUSTIN, JR.

DIRECT EXAMINATION

(TR-154)

BY MR. CRENSHAW:

Q. Mr. Austin, would you, for the Court, state your name and official position with the City of Norfolk?

A. George W. Austin, Jr. I am the chief highway engineer for the City of Norfolk. I have been with the Public Works Department approximately 26 years.

Q. And in that job, have you had anything to do with the relocation of the

streets or realignment of streets and redevelopment projects in the City of Norfolk and the problem of relocating utilities within those streets?

A. Yes, sir.

Q. And when a redevelopment plan is adopted and then later approved by the Council of the City of Norfolk, is the Public Works Department, on behalf of the City, involved in the construction and the redesign of the streets that would go back into those redevelopment project areas?

A. Yes, sir.

Q. In what way is it involved, sir?

(TR-155)

A. We review those documents as prepared, plans, to assure they are being done in accordance with our responsibility for representing the owner, the City of

Norfolk.

Q. That would be with respect to every street that is reconstructed in each of these plans?

A. Yes, sir. If it is the public's responsibility to maintain.

Q. Now, with respect to that, are you or your department shown the plans for the redesigned streets, and with respect to that, do these plans include the provisions for the relocation of the utilities?

A. Yes, sir.

Q. And before any work is done on that, is the approval of your department essential?

A. It is.

Q. And did the Authority actually act as liaison, or do the contacting people with respect to the streets we have

been talking about today?

A. Yes, sir.

Q. Now, with respect to the design of Olney Road, do you know why it was desired to widen and improve Olney Road?

A. It is part of the redevelopment of the area and the new land use, and also the transportation needs in

(TR-156)

that area.

Q. And can you mention any of the generators for the transportation that you expected to have to supply in the future for that area?

A. It is a major east west corridor, arterial, and our adopted transportation plan and on the western end and we will have a major medical facility in Eastern Virginia.

Q. So that the construction and prospective construction of a medical center is something that your traffic pattern has to accommodate?

A. That is correct, sir.

Q. Would the widening of Olney Road be essential for that?

A. It would.

Q. Now then, in that connection, your review of plans would include those for the relocation of Colley Avenue as well as the widening of Olney Road?

A. Yes, sir.

Q. Do you, yourself, have any contact with any of the representatives for Chesapeake and Potomac Telephone Company with respect to relocation of their lines?

A. Yes, sir.

Q. And what contact was that?

A. We have contact with them in regard to part

(TR-157)

of the review process of these plans, from time to time, as well as having people represented with the highway department when they are dealing with projects that the highway department is carrying out for City of Norfolk, as well as those improvements that we are making totally with local funds, wherein we have the total responsibility.

Q. Now, from time to time, have you dealt with -- have you requested the telephone company to move its facilities for some activity of the City not connected with redevelopment projects?

A. Yes, sir, we have.

Q. Have they done it at your

request?

A. They have.

Q. Have they paid for it?

A. Yes, sir.

Q. Has the City ever paid for any part of it?

A. On a clear dedicated right-of-way, no sir.

****

(TR-160)

THE COURT:

Now, under the circumstances, since this is being tried without a jury, I think the easiest thing for me to do is announce all of those exhibits are acceptable and those that have some particular force that you want to argue about as being improper for some reason, you do it and then I will decide whether I ought to

look at them or not.

THE CLERK: You are accepting them all in now?

THE COURT: They are all in. You don't have to worry about it.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Exhibit No. 1

AN ORDINANCE

GRANTING PERMISSION TO THE SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, ITS SUCCESSORS AND ASSIGNS, TO CONSTRUCT, ERECT, OPERATE AND MAINTAIN SUB-WAYS, POLES, WIRES, CABLES AND OTHER ELECTRICAL CONDUCTORS UPON, OVER AND ALONG THE PUBLIC WAYS OF THE CITY OF NORFOLK, VIRGINIA.

SECTION 1. Be it ordained by the Select and Common Council of the City of Norfolk, Virginia: That permission be, and hereby is, granted to the Southern Bell Telephone and Telegraph Company, its successors and assigns, to erect, operate

and maintain its lines, including the necessary poles, wires and fixtures, upon, along and over sub-ways, with the necessary manholes and other appurtenances, under the surface of such public ways for the purpose of transmitting communication by electricity, the use of such public ways to be under such regulation affecting the general supervision and maintenance of such public ways as may be prescribed by law and the ordinances of said City; provided, however, that within that section of the City as described in "An Ordinance extending the business section of the City in which conduits are to be placed", passed by the Common Council on February 8th, 1898, and by the Select Council on February 24th, 1898, no pole or overhead fixture shall be erected, except

poles and fixtures for local distribution; the use of such public ways to be subject to the general regulations relating thereto as may be prescribed by the laws of the State of Virginia and the ordinances of the City of Norfolk governing the manner of the use of such public ways as aforesaid.

SECTION 2. In consideration of the rights herein granted to the Southern Bell Telephone and Telegraph Company, its successors and assigns, said Company shall supply to the City of Norfolk, when demanded by the City Councils, free service for the fire alarm wires of the city, such wires to be placed upon the topmost arms or fixtures of all poles erected and space shall also be provided by said Company, free of cost to said City, within

all subways constructed under the provisions of this ordinance for such wires. The said Company shall also furnish, free of cost to said City, ten telephones to be placed as designated by the City Councils, and shall also pay to said City annually three (3) per centum of the gross earnings realized from local telephone exchange service within the corporate limits of the City of Norfolk; but this does not exempt the said Southern Bell Telephone and Telegraph Company, its successors and assigns, from any license or other tax or assessement that may be levied by the City of Norfolk; and as a guarantee of the faithful performance of the foregoing provisions the books and system of accounts, showing the gross income derived from such local exchange telephone business as

aforesaid, shall be subject, at the end of each fiscal year, to inspection and verification by the Auditor of the City of Norfolk; and it shall be the duty of the Auditor, upon the request of the Finance Committee, to so inspect, audit and report said accounts and verify such reports as may be made by the said Southern Bell Telephone and Telegraph Company, its successors and assigns.

SECTION 3. The Southern Bell Telephone and Telegraph Company, its successors and assigns, before proceeding with the work of erecting poles, or laying subways, or constructing any of the details connected with this franchise, shall file a written description thereof with the City Engineer at least one week before the beginning of said work so as to

give the said Engineer time to examine into the matter, and shall protect and not interfere in any way with the existing gas, water, sewer or other pipes in the streets and avenues of said city, and shall, upon notification from the said Engineer, make good to the satisfaction of the owners of any pipes which may be damaged by it, any damage to said pipes done by it or its workmen, and should the said Southern Bell Telephone and Telegraph Company, its successors and assigns, refuse at any time to obey the directions of the said City Engineer in the premises and fail to make good any damage whatever to gas, water, sewer or other pipes, or to relay the pavements of said city to the satisfaction of the City Engineer, then the Southern Bell Telephone and Telegraph

Company, its successors and assigns, shall be liable to a fine, payable to the City of Norfolk, of not exceeding $100.00 a day, for each and every day's delay in carrying out said order, after reasonable notification thereof, to be recovered by law; and should the Southern Bell Telephone and Telegraph Company, its successors and assigns, at the expiration of ten days from the termination of such reasonable notice still fail to carry out the directions of the City Engineer, then the said Engineer is hereby authorized and empowered to have said damage repaired at the expense and cost of the said Southern Bell Telephone and Telegraph Company, its successors and assigns; and should they fail to pay the expenses and cost of said work promptly upon the bills therefor

being presented, then the franchise herein granted to the Southern Bell Telephone and Telegraph Company, its successors or assigns, shall at once cease and determine, if so ordered by the City Councils; provided, however, that if the failure to carry out any directions from the City Engineer as provided in this section, shall be found to have been unavoidable, then the said fine herein provided for shall be remitted. The Southern Bell Telephone and Telegraph Company, its successors and assigns, shall within sixty days from the passage of this ordinance enter into a bond payable to the City of Norfolk in a penalty of ten thousand dollars, with security satisfactory to the Councils of said City, conditioned to indemnify said City against any damage or

lost that may result in any way from the prosecution of said company's work, whether to gas, water, sewer, or other pipes, buildings or individuals, or any other damage to property or persons, and for the proper restoration and repair of all streets and pavements in anyway disturbed by it; but the taking of such bond of ten thousand dollars by said City shall not be construed as limiting to this amount the liabilities of said Southern Bell Telephone and Telegraph Company, its successors or assigns, for any damage or loss that may result in any way from the prosecution of its work, as aforesaid; and the Southern Bell Telephone and Telegraph Company, its successors and assigns, shall, upon notification by the City Engineer that he intends to lay sewer or

water pipes, at once proceed to change the location of any subways constructed by it that may interfere with the progress of the work, or else protect the same at its own expense and without cost to the City.

SECTION 4. All work under the ordinance shall be under the supervision of the Board of Electrical Control and in compliance with the ordinances of the City of Norfolk.

SECTION 5. This ordinance is subject to the further condition that said Southern Bell Telephone and Telegraph Company, its successors and assigns, shall, within sixty days from the passage of this ordinance, and before the same shall take effect, make and enter into a bond in a penalty of fifty thousand dollars, with security satisfactory to the

Councils of the City of Norfolk, and payable to said city with condition to indemnify and save harmless the said city from any and all damage or damages for which the city may become liable to the Southern States Telephone Company, its successors or assigns, by reason of the passage of this ordinance, or any section hereof, in consequence of the same being in conflict with the ordinance entitled "An ordinance granting permission to W. R. Brown and J. A. Helvin, and associates, to erect, maintain and conduct under certain streets subways or conduits, pipes or continuous ducts of metal stone or other durable material, and to conduct within the same wires for certain electrical business, and to do a telephone business", adopted by the Common Council August 6th,

1895, and by the Select Council August 13th, 1895; provided, however, that the City of Norfolk shall notify the Southern Bell Telephone and Telegraph Company, its successors or assigns, of any suit or action which may be brought by the Southern States Telephone Company, its successors or assigns, against the said city for the causes aforesaid, and permit the said Southern Bell Telephone and Telegraph Company, its successors and assigns, to join with said City in the defence [sic] thereof.

SECTION 6. The privileges conferred by this ordinance are granted upon the condition that the local exchange telephone service to be furnished by the Southern Bell Telephone and Telegraph Company, its successors or assigns, shall

be equal in all respects to the service furnished by said Company in other cities in the State of Virginia of about the same population as the City of Norfolk; otherwise the rights herein granted shall cease and determine; provided, further, that the Southern Bell Telephone and Telegraph Company, its successors or assigns, shall not furnish service at rates below those from time to time charged by any other Telephone Company in the City of Norfolk for the same service.

SECTION 7. Nothing contained in this ordinance shall be construed as granting to the Southern Bell Telephone and Telegraph Company, its successors and assigns, and [sic] exclusive right or rights, or as preventing the granting of similar privileges to other individuals or

companies for like purposes on the public ways of the City of Norfolk.

SECTION 8. The Southern Bell Telephone and Telegraph Company, its successors and assigns, shall at all times be subject to the general ordinances of the city now in existence or which may be hereafter passed, relative to the manner of the use of public streets or other public places by telegraph or telephone companies.

SECTION 9. The right to amend, alter or repeal this ordinance is hereby reserved to the City of Norfolk at its pleasure and without making compensation for any damage that may result from such amendment, alteration or repeal.

SECTION 10. The Southern Bell Telephone and Telegraph Company is

authorized to use the conduits of any other company, upon such terms as may be mutually agreed upon between such companies, and nothing in an ordinance entitled "An Ordinance granting permission to The American Telephone and Telegraph Company of Virginia to construct, erect, operate and maintain sub-ways, poles, wires, cables and other electrical conductors on the public ways of the City of Norfolk, Va.", passed by the Common Council of the City of Norfolk, on the 7th day of April, 1897, and by the Select Council of said City on the 11th day of May, 1897, shall be construed as forbidding said American Telephone and Telegraph Company of Virginia, from entering into contracts with the Southern Bell Telephone and Telegraph Company for

the use of its conduits.

SECTION 11. This ordinance shall be in force from its passage.

Adopted by the Common Council April 15, 1898.

(Sd.) Jas. L. Winston,
President Common Council.

Adopted by the Select Council April 12th, 1898.

(Sd.) J. C. Carroll,
President Select Council.

A Copy-teste: (Sd.) H. S. Herman,
City Treasurer.

UNITED STATES DISTRICT COURT

Exhibit No. 17(a)

East Ghent South Redevelopment
Project, Va. A-1-1

Block	Parcel	Date of Settlement
18	1	5/17/72
	2	6/ 1/72
	5	5/18/72
	6	12/20/72
	7	1/ 4/71
	8	11/10/70
	9	11/ 5/71
	10	8/11/70
	11	11/ 5/71
	12	10/28/70
	13	11/24/70
	14	11/ 2/70
	15	5/ 4/72
19	25	10/15/71
	26	1/22/71
	27	11/30/70
	28	11/10/70
17	17	3/ 8/72
	18	1/ 4/71
	19	5/ 4/71
	20	5/31/72
	21	9/11/75
14	1	1/ 4/71
	20	9/ 3/71
	21	1/ 8/71
15	10	12/17/70
	11	7/10/72

East Ghent South Redevelopment
Project, Va. A-1-1 (continued)

Block	Parcel	Date of Settlement
	12	10/ 5/71
	13	5/16/72
	14	5/ 4/72
	15	11/10/70
	16	11/11/70
	17	8/30/71
	18	11/17/70
	19	11/24/70
	20	1/ 4/71
	21	1/10/72
	22	11/25/70
	23	5/ 4/72
	24	3/ 7/72
	25	7/27/71
	26	5/31/72
17	1	1/ 8/71
	2	1/12/72
	3	11/17/70
	4	3/18/71
	5	12/17/70
	6	11/24/70
	7	11/24/70
	8	1/ 8/71
	9	11/10/70
	10	10/27/70
	11	5/19/71
	12	6/ 2/71
	13	10/ 5/71
	14	12/17/70
	15	1/12/73
	16	1/12/73

East Ghent South Redevelopment
Project, Va. A-1-1 (continued)

Block	Parcel	Date of Settlement
	40	10/ 5/71
16	1A	5/22/75
	6	12/18/70
	7	9/15/70
15	1	5/23/72
	27	11/ 3/72
10	8	8/27/70
	9	4/29/71
11	1	9/ 1/72
	18	8/14/72
	19	5/11/72
	20	6/29/71
9	1	8/ 5/74
	1A	7/ 1/71
8	1	12/15/70
	11	11/10/70
	12	12/15/70
	13	2/ 9/71
	14	12/ 1/71
	6	12/ 1/70
	7	4/27/72
	8	5/27/71
	9	11/10/70
	10	12/30/71
11	2	1/ 5/71
	3	10/22/70
	4	1/ 4/71
	5	11/27/70
	6	1/ 4/71

East Ghent South Redevelopment
Project, Va. A-1-1 (continued)

Block	Parcel	Date of Settlement
	7	2/15/72
	8	11/ 2/70
	9	1/ 8/71
	10	11/15/71
7	12	7/ 6/72
	13	5/11/71
	14	12/24/70
	15	5/17/71
	16	1/10/72
	17	5/24/71
	18	6/11/71
	19	5/10/71
	20	7/30/71
12	2	2/ 9/71
	3	10/28/70
	4	5/ 2/72
	5	7/10/72
	6	6/25/71
	7	1/12/73
	8	1/12/73
	9	8/ 9/72
	10	6/ 2/71
	11A	6/ 6/72
	11B	4/19/71

UNITED STATES DISTRICT COURT

Exhibit No. 17(b)

East Ghent North Redevelopment Project, Va. A-1-2

Block	Parcel	Date of Settlement
6	1	7/ 6/70
7	9	12/17/69
	10	12/17/69
	11	2/ 6/70
4	1	10/11/71
3	8	8/14/70
	9	4/19/71
30	1	9/ 4/70
	25	9/ 8/70
31	5	9/ 1/70
	6	6/ 1/70
	7	3/ 8/71
24	5	3/26/70
	6	6/ 1/70
	7	5/20/70
	8	6/ 2/71
25	1	7/10/70
	14	8/14/70
	15	5/20/70
	16	6/30/70
	17	10/15/70
21	7	7/16/71
	8	8/ 8/70
	9	6/17/70
	10	12/30/70
19	1	8/14/70
	2	4/21/71
	11	8/16/71

East Ghent North Redevelopment
Project, Va. A-1-2 (continued)

Block	Parcel	Date of Settlement
1	9	5/11/71
	10	3/ 8/71

UNITED STATES DISTRICT COURT

Exhibit No. 17(c)

Rosemont Redevelopment Project,
Va. R-25

Block	Parcel	Date of Settlement
54	1	2/25/66
	2	11/28/66
	3	11/15/65
	4	9/29/65
	5	11/28/66
	6	3/ 4/66
	7	11/29/66
	8	12/23/65
	9	11/30/66
	10	10/11/66
	11	8/ 9/66
	12	8/31/65
	13	8/25/63
	14	7/16/65
	15	8/ 5/64
	16	11/21/66
	17	11/21/66
	18	8/13/65
	19	1/20/66
55	1	11/ 9/65
	2	11/ 8/65
	3	7/17/64
	4	11/29/66
	5	3/18/66
	6	9/23/66
	7	12/27/65
	8	3/ 1/66
	9	9/23/66
	10	9/10/65

Rosemont Redevelopment Project,
Va. R-25 (continued)

Block	Parcel	Date of Settlement
	11	8/ 7/67
	12	
	13-16	
	17	
	18	3/ 2/66
	19	
	20	
	21	
	22	
	23	
	24	11/28/66
	25	
	26	1/ 6/66
	27	2/25/66
	28	6/10/65
	29	1/31/66
	30	9/28/66
	31	4/21/65
	32	10/27/65
	33	11/30/66
	34	4/27/66
	35	4/27/66
	36	2/18/66
	37	6/27/66
56	1	2/ 3/65
	2	11/ 8/65
	3	1/19/67
	4	1/19/67
	5	6/16/66
	6	1/18/66
56	7	3/17/67

Rosemont Redevelopment Project,
R-25 (continued)

Block	Parcel	Date of Settlement
	8	10/11/66
	9	8/ 5/66
	10	4/11/66
	11	6/27/66
	12	11/19/65
	13	8/ 8/66
	14	1/20/66
	15	10/24/67
	16	3/29/66
	17	2/17/66
	18	2/17/66
	19	4/12/66
	20	8/31/65
	21	10/21/65
	22	12/27/65
	23	2/18/66
	24	4/19/66
	25	7/21/66
	26	12/13/65
	27	7/22/63
	28	9/ 8/64
	29	9/21/65
	30	6/18/65
	31	4/30/65
	32	5/13/65
	33	9/27/66
	34	9/27/66
	35	6/30/66
	36	5/ 5/66
	37	12/27/65

Rosemont Redevelopment Project,
R-25 (continued)

Block	Parcel	Date of Settlement
	38	9/27/66
	39	9/28/66
	40	6/ 3/64
	41	9/28/66
	42	9/28/66
	43	12/16/65
	44	9/27/66
	45	11/29/66
	46	7/31/63
	47	10/12/66
	48	6/ 6/67
50	1	2/ 3/65
	2	5/26/66
60	1	8/21/64
	2	6/23/66
	3	8/ 5/66
	4	
	5	3/11/66
	6	4/21/64
	7	3/ 9/65
	8	12/23/66
	9	5/20/68
	10	3/22/67
	11	11/ 7/66
	12	6/30/66
	13	5/20/65
	14	11/21/66
	15	4/22/64
60	16	3/22/67
	17	8/ 1/66

Rosemont Redevelopment Project,
R-25 (continued)

Block	Parcel	Date of Settlement
	18	9/15/66
	19	10/28/66
	20	12/21/65
	21	1/20/66
	22	11/ 2/67
59	1	7/22/63
	2	9/13/66
	3	7/30/65
	4	3/ 2/66
	5	4/22/66
	6	7/25/66
	7	11/18/66
	8	8/ 4/66
	9	
	10	
	11	
	12	1/ 9/68
	13	8/28/63
	14	6/30/66
	15	3/15/67
	16	7/22/66
	17	
	18	
	19	5/ 2/67
	20	6/16/66
	21	8/ 9/66
	22	8/ 9/66
	23	8/ 5/66
	24	10/11/66
	25	5/ 2/67
	26	10/20/66

Rosemont Redevelopment Project,
R-25 (continued)

Block	Parcel	Date of Settlement
58	1	6/30/66
	2	11/ 2/67
	3	1/ 9/68
	4	2/15/65
	5	10/ 3/67
	6	3/ 6/67
	7	3/ 7/67
	8	11/ 8/66
	9	11/23/66
	10	10/12/66
	11	7/28/65
	12	3/ 1/67
	13	8/18/66
	14	3/ 7/67
	15	4/15/66
	16	8/ 4/66
	17	3/ 6/67
	18	8/ 5/66
	19	12/27/66
	20	8/ 7/64
	21	9/ 2/66
	22	7/15/16
	23	7/15/66
	24	1/25/67
	25	6/26/67
	26	8/ 6/64
	27	1/18/66
58	28	8/25/65
	29	8/ 2/63
	30	5/26/66

Rosemont Redevelopment Project,
R-25 (continued)

Block	Parcel	Date of Settlement
57	1	
	2	
	3	4/15/68
52	1	11/ 9/65
	31	6/14/66
51	23	6/27/66
	24	12/27/65
48	1	7/22/64
	42	7/23/65
49	22	12/31/64
	23	5/11/65
45	1	11/27/63
	36	3/ 7/63
44	21	6/ 2/64
	22	3/16/65
42	1	7/31/63
43	23	3/18/65
	24	1/25/65
39	1	4/14/65
	2	6/ 8/64
	3	4/14/65
	4	5/15/64
	7	9/16/64
	9	1/31/66
	10	7/21/65
	11	10/26/64
	12	6/22/64
	13	11/24/64
	14	7/ 5/64
	15	11/24/64

Rosemont Redevelopment Project,
R-25 (continued)

Block	Parcel	Date of Settlement
	16	6/17/64
	17	7/21/64
	18	3/ 2/65
	19	11/24/64
	20	3/ 2/65
	21	6/22/64
43	2	5/ 5/64
	3	5/ 5/64
	4	12/27/65
	5	6/10/64
	6	5/12/64
	7	7/22/64
	8	4/30/64
	9	9/ 8/64
	10	6/ 1/64
	11	9/ 2/64
	12	4/29/64
	13	12/14/64
	14	3/ 5/65
	15	1/18/66
	16	6/10/64
	17	4/22/64
	18	7/21/65
	19	6/ 9/64
	20	6/ 2/64
	21	12/ 4/64
	22	6/ 2/64
	23	3/18/65

UNITED STATES DISTRICT COURT

Exhibit No. 20 (AA)

March 19, 1973

Mr. Arthur Freeman, III
Director, Public Utilities
City Hall
Norfolk, Virginia 23510

Reference: East Ghent Redevelopment
C & P Telephone Company
Project No. 6679
Relocate Plants Along Olney
Road and Botetourt Gardens

Dear Mr. Harrell:

Attached herewith is one print each of sheet 1 of 1 covering the Olney Road, C & P Telphone Company project and the Botetourt Gardens, C & P Telephone Company project.

We have attempted to coordinate this work with the various utilities and feel that this has been accomplished.

The Olney Road project will require a city drain to be abandoned and a catch basin to be relocated. The C & P Telephone Company wil pay to have this 12" line abandoned and a new 12" line installed complete with new catch basins to tie in as shown on the

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attached drawing. This work, of course, will be accomplished in accordance with city requirements of specifications and inspection.

The Botetourt Gardens project has been coordinated with the East Ghent South Part I project of the Redevelopment Authority and must be accomplished in order to abandon the telephone duct work and cabling in Duke Street which pass through the middle of abandoned and future closed streets.

We will appreciate your review of the referenced drawings and any comments you would like to make.

We respectfully request your approval of the telephone duct work location so that the project may be started at the earliest possible time.

If there are any questions concerning the design, please call us direct and we will be happy to meet and discuss the projects with you. Your continued cooperation in the East Ghent area is appreciated.

Very truly yours,

McGAUGHY, MARSHALL &
MCMILLAN

Jack M. Hill, P.E.

JMH:jh

Enclosures

cc: Mr. Kenneth R. Pittman, C & P
Telephone Co.
Mr. David Rice, Norfolk Redevelopment
and Housing Auth.

UNITED STATES DISTRICT COURT

Exhibit No. 20 (AA) (17)

CITY OF NORFOLK

March 29, 1973

Mr. Jack M. Hill, P. E.
McGaughy, Marshall & McMillan
220 West Freemason Street
Norfolk, Virginia 23510

Reference: ast Ghent Redevelopment
C & P Telephone Company
Project No. 6679
Relocate Plants Along Olney
Road and Botetourt Gardens

Dear Mr. Hill:

The Division of Traffic Engineering, Department of Public Works, City of Norfolk offers no objections to the location of the telephone duct work along Olney Road and Botetourt Gardens as indicated on the plans submitted by you.

The Division of Surveys did bring to my attention that the duct line is on City of Norfolk property and not in the Public Right of Way between Mowbray Arch and Duke Street, therefore, the

C & P Telephone Company should request that an easement be granted in this area.

Very truly yours,

/s/D. R. Norris

D. R. Norris
Engineering Technician

DNR:jmr

cc: Central Files
Mr. Jordan
Mr. Norris

UNITED STATES DISTRICT COURT

Exhibit No. 21

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
RICHMOND AREA OFFICE
701 EAST FRANKLIN STREET
RICHMOND, VIRGINIA 23219

REGION III
Curtis Building
6th and Walnut Streets
Philadelphia, Pennsylvania 19106

IN REPLY REFER TO
3.4G

June 18, 1979

Mr. Joseph L. Kelly
Williams, Worrell, Kelly & Greer
1700 Virginia National Bank Building
Post Office Box 3416
Norfolk, VA 23514

Mr. Francis N. Crenshaw
Crenshaw, Ware & Johnson
1640 Virginia National Bank Building
One Commercial Place
Norfolk, VA 23510

Dear Mr. Kelly and Mr. Crenshaw:

The Area Office has reviewed the claim of the Chesapeake and Potomac Telephone Company (C&P) for expenses in moving property pursuant to the Uniform Relocation

Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 et seq. (URA). The claim arises from the relocation of utility lines pursuant to urban renewal projects in Norfolk, Virginia as follows:

DATE	AMOUNT	WORK PERIOD	NRHA PROJECTS
5-4-75	$ 44,451.52	March '72 - December '74	VA R-25 - Rosemont
5-9-75	86,371.10	April '72 - June '74	VA R-8 - Olney Road
11-19-75	130,995.18	July '72 - February '75	VA R-8 - Downtown North
4-8-77	20,411.13	February '72 - February '74	VA R-8 (Manhole Charlotte)
4-8-77	389,537.60	February '73 - July '76	VA R-8
8-17-77	14,565.00(est)	August '77	VA A-1 - Berkley (II)
	$686.422.53		

[2]
The discussions of this matter have continued among the parties for several years and have included numerous issues. Due to the size of the claim, both the Norfolk Redevelopment and Housing Authority (the Authority) and C & P have diligently defended their respective positions, and, of necessity, this Area Office has labored long in giving the matter its due consideration. It is assumed that our decision will not be the end of this matter; however, we have attempted to deal with all of the issues presented so that any future controversies arising from this claim may be resolved more expeditiously.

It should be stated here that, while C & P has advanced a number of arguments that are well taken, the claim must be denied. However, although we have not conducted an exhaustive engineering review of line items claimed, if C & P were entitled to payment for the relocations, it appears that the expenses have been properly incurred, accounted and presented.

C & P bases its claim primarily on URA Sections 4601 and 4622, which provide, in part:

Section 4622(a) Whenever the acquisition of real property for a program or project ... will result in the displacement of any person ... the head of such agency shall make a

payment to any displaced person ... for--

(1.) Actual reasonable expenses in moving himself, his family, business, farm operation, or other personal property;

(2.) Actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expense that would have been required to relocate such property...;

Section 4601

(5.) The term "person" means any individual, partnership, corporation or association;

(6.) The term "displaced person" means any person who ... moves from real property, or moves his personal property from real property, as a result of the acquisition of such real property, in whole or in part, or as a result of the written order of the acquiring agency to vacate real property, for a program or a project...;

(7.) The term "business" means any lawful activity,

excepting a farm operation, conducted primarily - ...

(B) For the sale of services to the public; ...

[3]
To answer the fundamental question of whether C & P is entitled to relocation benefits, therefore, it is necessary to analyze two basic issues:

(1) Did the property itself, without regard to other factors (such as ownership), fall within the ambit of the URA?, and

(2) Does the URA apply to the distribution facilities of a public service corporation?

The case involves few factual questions. In order to clarify the record and define the legal issues, however, it must be stated that the Area Office has found that the relocation of C & P property was caused by federally assisted Urban Renewal and Neighborhood Development projects.1

I. Did the utility property (lines, conduits, etc.) itself, without regard to other factors (such as ownership), fall within the ambit of the URA?

A. Was there an acquisition of real property?

Pursuant to certain redevelopment projects the Authority acquired title to land situated within the City of Norfolk as authorized by state and federal statutes. In order to be able to reconvey the land with clear title, it was necessary for the Authority to request the closing of certain streets within the project area.[2] The City, then, did close those streets. The Authority, at that time, clearly believed that C & P would not even request reimbursement for its relocation expenses[3] and did not budget any money for that purpose,[4] a fact which is not, of course, relevant in determining C & P's entitlement to URA benefits. C & P moved its lines, etc., and filed a claim in a timely manner.[5]

The Authority argues that it was not responsible for the street closing. In Virginia, as in most jurisdictions,[6] it is settled that the power to close streets rests only in the local governing body or the State. In the case of

Mumpower v. Housing Authority of the City of Bristol, 11 S.E. 2d 732 (1940), the City had attempted to delegate the power to close the street to the Bristol Redevelopment and Housing Authority. The Supreme Court of Virginia held:

> By the second sentence of paragraph 11 the city "agrees that without charge to the Authority, it will vacate and close any streets, roads, roadways,
> [4] alleys, sidewalks or other places (which the Authority finds are reasonably necessary in the development of the Project) located in the area of said project or adjacent thereto." (Italics supplied.)
>
> The court is unable to find any basis upon which the validity of

> this sentence may be founded. It clearly, if sustained, places beyond the control of the local legislative representatives of the people, the determination of matters directly and vitally effecting the public safety. The location of public ways is purely a legislative function.
>
> p. 743

However, the fact that the City must be the entity to actually close the street is not determinative. The decision to close was clearly made pursuant to the Urban Renewal Plan, and the City, under Title I of the Housing Act of 1949, 42 U.S.C. 1450, as amended, is required to approve that plan:

> Sec. 105. Contracts for loans or capital grants shall be made only with a duly

> authorized local public agency and shall require that (a) the urban renewal plan for the urban renewal area be approved by the governing body of the locality in which the project is situated, and that such approval include findings by the governing body that ... (iii) the urban renewal plan conforms to a general plan for the development of the locality as a whole ....

The Authority, therefore, cannot deny responsibility for the street closings. While it might be argued that the City could have chosen to not close a particular street, it is certainly not reasonable to even entertain the idea that the City would have jeopardized these projects and millions of dollars of federal assistance by refusing its obligation to close the streets. Additionally, the geography

of these projects is such that a political decision not to close a particular street would almost necessarily require the closing of another, which would raise the same relocation problems.

As an additional (and definitive) point, the URA specifically provides that moves necessitated by urban renewal projects will be deemed as made pursuant to a real property acquisition without the actual necessity of a taking:

Section 4637

> A person who moves or discontinues his business, or moves other personal property, or moves from his dwelling on or after January 2, 1971, as a direct result of any project or program which receives Federal financial assistance under Title I of the Housing Act of 1949, as amended, or as a result of carrying out a comprehensive city demonstration program under Title I of the Demonstration Cities

and Metropolitan Development Act of 1966 shall, for the purposes of this subchapter, be deemed to have been displaced as the result of the acquisition of real property. [Emphasis added.]

It is this acquisition of real property, of course, that creates the rights to reimbursement in Section 4622.

The underlying rights of the fee holder must also be considered. As noted earlier at footnote 2, the abutting landowners presumptively hold the fee to the middle of the street, and it is the condemnation of all of the abutting land that enables the Authority to have the street closed. Ascertaining the exact point in time at which the street closing takes place in relationship to the final acquisition of the abutting land by the Authority is the precise sort of question that § 4637 seeks to avoid.[7] Given that C & P was forced to relocate as a direct result of Title I activity, then,

it is appropriate to inquire into the nature of the property relocated.

B. Utility Lines -- Real or Personal Property?

The Authority makes the bare assertion that "the lines are real property, not personalty."[8] To prove or disprove this point, much discussion has centered around questions as how the lines are taxed and how they have been treated in other localities or projects. This inquiry has resulted in much digression and confusion. The question is, quite simply, governed by the law of fixtures,[9] which looks to the intent of the parties at the time the property is connected to the land. The case of Bangor-Hydro Electric Company v. Johnson, 226 A. 2d 371 (1967) cited by C & P is quite informative in this regard. There the court held:

> The test to determine whether personal property becomes part of real estate by

accession, composed from Maine case law may be expressed as follows: Except in cases of trespass * * * a chattel is not merged in the realty, unless (1) it is physically annexed, at least by juxtaposition, to the realty or some appurtenance thereof, (2) it is adapted to the use to which the land to which it is annexed is put, or the chattel and the real estate are united in the prosecution of a common enterprise, and (3) it was so annexed with the
[6] intention on the part of the person making the annexation to make it a permanent accession to the realty, * * * which intention is not the hidden secret intention of the party

> making the annexation, but the intention which the law deduces from such external facts as the structure and mode of attachment, the purpose and use for which the annexation has been made and the relation and use of the party making it. * * *
>
> Applying this test, we find nothing in this report sufficient to persuade a finder of fact that the reference utility poles become part of the real estate by accession. They remain tangible property and come within the purview of the [sales and use tax] "Act." (228 A.2d at p. 378).[10]

The situation of C & P's property is not

distinguishable from that of Bangor-Hydro. It is the position of this Area Office, therefore, that all of that C & P property removed from the public ways (which we understand to be all of the items claimed) must be regarded as personalty.

II. Does the URA apply to distribution facilities of a public service corporation?

Having established that the claim would be allowed for property other than utility lines, we must now set forth the reasons for which the claim must fail.

A. The nature and history of franchises.

In order that a public service company may serve a given area, the public must often permit the company to use public rights-of-way in a manner different from those permitted the public-at-large. As stated in 12 McQuillin, Municipal Corporations, 9, 10, § 34.03 (3rd Ed.):

> In American law, a franchise is defined as

> a special privilege conferred by the government on individuals or corporations and which does not belong to the citizens of a country generally by common right ...
>
> The term "franchise" includes the term "privileges" . . .
>
> When granted, a franchise becomes property in the legal sense of the word, by virtue of contractual rights, and is termed an incorporeal hereditament, though separate and distinct from the property necessary in its use and exercise.

[7] These unique benefits of franchises, however, are attended by the unique burden that the sovereign can, for bona fide public purposes, remove a utility's right to use the property without paying any compensation.

The common law recognized that certain public necessities would, on occasion,

require that the franchise rights granted would have to be altered or altogether revoked and held that the affected utility was the proper party to bear the expense.[11] It was reasoned that, as the public service corporations consumers were the beneficiaries of the special privileges attending the franchise, they must be the ones to pay for cost incurred when the public-at-large exercised paramount rights in the public way.[12] The expenses charged to the utility are, of course, then passed on to the consumers through the rate structure (this result obtains even where the two groups are coterminous). Statutes, of course, can change this result, as can agreements between the parties. C & P maintains that the URA effected such a statutory change, while the Authority argues that it did not and that the agreement between C & P and the City controls.[13]

The Authority maintains that C & P is not entitled to relocation benefits because

it is not a "business" within the meaning of statute. To a casual observer it might seem that C & P does wear many trappings of a business (e.g., AT&T, the parent entity, is one of the largest corporations in the world); however, the distinction implied by the Authority is that C & P is a public service corporation (utility) as distinguished from all other types of businesses. As public service corporations are generally monopolies regulated by the sovereign and governed by a unique body of law, this distinction appears valid.

This separate treatment of utilities has been upheld in cases post dating the URA that do not raise the URA issue.[14]

In the Eugene case, the City had vacated certain alleys in 1974 and required Pacific Northwest Bell Telephone Company to remove its underground lines in order to facilitate urban redevelopment.[15] The court cited Highway Commission v. Clackmas W. District, 428

P.2d 395, (1967) for the common law position:

> -- the franchise granted to defendant is not a vested property right but merely a permissive use subject to revocation or change whenever the use of the right-of-way for the benefit of the public requires it.

[8] The court went on to cite other cases for the proposition that absent an agreement to the contrary or a special law, a utility was required to relocate facilities at its own expense. While there is little probity in the failure of others to raise the URA claim, the fact that utilities and courts continued to operate under the common law system considerably after a much publicized statutory development demonstrates, at a minimum, that the claim is not as obvious and automatic as C & P seems to indicate.

B. The purpose of the URA.

The distinction between businesses and the

franchised lines of utilities carries over from the common law to the URA. The Supreme Court of Delaware dealt extensively with the applicability of the URA to utility lines in determining that the URA had not preempted a prior statute that operated to bar the utility from recovering relocation expenses. The court stated that the URA does not "extend coverage to include utilities within its definition of displaced persons or businesses," Artesian Water Company v. State Department of Highways and Transportation, 330 A.2d 432, 438 (1974).

The House Report on S.1 clearly supports this position when it states:

> Such persons are presently defined as displaced persons, and eligible for relocation payments and assistance, in programs of the Department of Housing and Urban Development. This section, therefore, merely continues established policy with respect to

such persons.
(Emphasis added)[16]

The "persons ... presently defined as displaced persons" in HUD programs did not include the conduits, lines, etc., of utility companies. The HUD Urban Renewal Handbook, RHA 7209.1, chapter 2, p. 4 stated:

> Removal or relocation of utility lines owned by a private utility company will not be allowed as a project expenditure unless compensation to the company is required under applicable State statutes, judicial decisions, or preexisting local ordinances or provisions of the company's franchise. (Emphasis added).

[9] This approach mirrors the common law rule. It also leaves C & P in the same basic position as the Artesian Water Company. Thus, the court's comment there is instructive:

> The point to be made here is that the URA

> did not alter the prior scheme insofar as those "persons" who are entitled to benefits are concerned, but rather the procedure for and the extent of coverage to be had for those "persons" thereby qualifying under the Act. Artesian's contention that the URA expanded on the class of persons entitled to coverage to include all utilities is therefore an unwarranted interpretation of the Act. p. 438

> Contrary to C & P's contention that "the denial of the claims for the reason stated [by the Authority] can only be done by ignoring the specific language of the Acts and by giving an improper construction and interpretation to them,"[17] the claim could only be granted by ignoring case law and by giving the statute an entirely literal reading that Congress did not intend.

Based on the reasons set forth above, this Area Office determines that the claim of

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the Chesapeake Potomac Telephone Company should be denied. The Company may seek judicial review of this determination pursuant to 24 CFR 42.250(c)(4).

Sincerely,

/s/I. Margaret White

I. Margaret White
Area Manager

Attachment - Footnotes

FOOTNOTES

[1]See discussion at I.A below.

[2]In Virginia, as in many jurisdictions, the abutting landowner owns the fee to the middle of the road, subject to the public easement of the right of passage, Western Union Tel. Co. v. Williams, 11 S.E. 106, 107 (1890). The public easement is, however, preeminent, and in order to exercise private rights over that property the land must be discharged of the servitude, whereupon the "absolute title and right of exclusive possession thereto reverts to the owner of the fee," Bond v. Green, 52 S.E. 2d 169, 173 (1949); Board of Supervisors of Louisa County v. Virginia Electric and Power Company, 192 S.E. 2d 768, 771 (1972). In a franchise situation the utility company has no rights to use the private property, as such, only the public way, so vacation of the streets serves a dual purpose.

[3]See Neighborhood Development program, Park Avenue, A-1, p. 22. It should be noted that VEPCO was paid for relocation of lines in this project; however, this was for undergrounding of above ground facilities pursuant to an opinion letter from the Authority's counsel to the effect that VEPCO would not otherwise be obligated to underground the lines. The ability to require undergrounding is not in issue here as we are dealing with lines already situated underground.

[4]In light of previous footnotes, it must be noted that the Urban Renewal Handbook 7209.1 would have precluded paying for C & P's relocation even had they requested, as it would not have been an eligible expense.

[5]The Authority had initially raised the issue of the timeliness of the C & P claim in the letter of October 25, 1976 from Francis Crenshaw to Mr. Harrison Bush, Esquire, of C & P. C & P's response to this in its September 28, 1978 letter to this Area Office from Joseph Kelly effectively rebutts this contention. The Authority has, in any event, conceded the point.

[6]See 10 McQuillin, Municipal Corporations 727, 39.40, 3rd Ed.

[7]A finding that there has been no acquisition of real property is not to be lightly taken. It must be recalled that it was the variations of the acquisition process that were, in a large degree, responsible for the URA. The House Report, in discussing the term "displaced person" notes:

> (3) The term "displaced person" means any person who, on or after the effective date of the act, moves from real property, or moves his personal property from real property as a result of the acquisition of such real property, or as the result of the written notice of the acquiring agency or any

other authorized person to vacate such property, for a program or project undertaken by a Federal agency, or by a State agency with Federal financial assistance. If a person moves as the result of such a notice to vacate, it makes no difference whether or not the real property actually is acquired . . .

[2] It is immaterial whether the real property is acquired before or after the effective date of the bill, or by Federal or State agency; or whether Federal funds contribute to the cost of the real property. The controlling point is that the real property must be acquired for a Federal or Federal financially assisted program or project. For example: . . .

It makes no difference to a person required to move because of the development of a postal facility which method the postal authorities use to obtain the facility, or who acquires the site or holds the fee title to the property. Since the end product is the same, a facility which serves the public and is regarded by the public as a public building, any person so required to move is a displaced person entitled to the benefits of this legislation.

1970 U.S. Code Congressional and Adminstrative News, 5853-4 (House Report No. 91 - 1656, 91st Congress, 2d session.)

[8]See letter from Francis Crenshaw to Harrison Bush, 10-25-76.

[9]C & P very effectively argues this point in their Memorandum #D-1203.

[10]The holdings of Virginia cases are to the same effect, e.g., Transcontinental Gas Pipe Line Corp. v. Prince William County, 172 S.E. 2d 757 (1970); Western Union Telegraph Company v. Williams, 11 S.E. 106 (1890); Talley v. Drumheller, 130 S.E. 385 (1925).

[11]See generally, 12 McQuillin, Municipal Corporations 183, § 34.74a (3rd Ed).

[12]See Id.; Artesian Water Company v. State Department of Highways and Transportation, 330 A.2d 432 (1974).

[13]The Franchise Ordinance of April 1898, Section 9, provides:

> The right to amend, alter or repeal this ordinance is hereby reserved to the City of Norfolk at its pleasure without making compensation for any damage that may result from such amendment, alteration or repeal.

This provision is certainly broad enough to include relocation of the utility line. If it were not, however, the construction in favor of the City would be adopted and/or the common law rule would prevail. See Urban Renewal Agency of the City of Eugene v. Pacific Northwest Bell Telephone Company, 542 P.2d 908, 912 (1975).

[14]Urban Renewal Agency of Eugene, 912; Union Electric Company v. Land Clearance for Redevelopment Authority of the City of St. Louis, 555 S.W. 2d 29 (1977).

[3]

[15]This was done for reasons similar to those in C & P's situation (see footnote 2).

[16]1970 U.S. Code Congressional and Administrative News, 5869 (House Report No. 91-1656, 91st Congress, 2d Session).

[17]Letter from Joseph Kelly to Area Manager, September 28, 1978, Exhibit A, P. 6.

UNITED STATES DISTRICT COURT

Exhibit 32

C & P TELEPHONE
1710 H. Street, N.W.
Washington, D.C. 20006
Phone (202) 637-9900

Legal Department

April 21, 1972

The Honorable Sam T. Barfield
Commissioner of the Revenue
City of Norfolk
City Hall
Norfolk, Virginia 23510

My dear Mr. Barfield:

This letter is submitted pursuant to the commitment I made at our meeting on April 18, 1972 and Section 58-1141 of the Code of Virginia.

As you are aware, the City of Norfolk has for some years classified most of our property as personal property and levied a tax on it at a rate higher than the real property rate. In 1966, the Virginia Legislature enacted Section 58-514.2 of the Code of Virginia which provides in essence that all of our property, except automobiles and trucks, is to be taxed at the real estate rate. This section further provides, however, that with

respect to property taxed at a higher personal property rate in 1966 the change to the real property rate could be accomplished gradually over a twenty-year period.

A 1970 decision of the Supreme Court of Appeals and a more recent Opinion of the Attorney General requires the immediate reclassification as real property of certain company property classified and taxed as personal property in 1966. In Transcontinental Gas Pipe Line Corp. v. Prince William County, 210 Va. 550 (1970), the Court held that the status of Transcontinental's gas mains must be determined by the law of fixtures and that they could only be properly classified as real property. The Attorney General has taken the position that property that is classifiable as real property under the tests set forth in this decision should be treated as having always been real estate for the purpose of applying Section 58-514.2 of the Code. Opinion of the Attorney General to The Honorable Charles A. Callahan, Commissioner of the Revenue, Report of the Attorney General (1970-1971) p. 375.

As we discussed at our Tuesday meeting, it is the Company's position that a proper application of the rule of the

Transcontinental case requires that the following Company property be reclassified as real property:

pole lines
conduit
wire lines
central office equipment

The provisions of Section 58-514.2 would of course continue to apply to the remainder of the property classified as personal property in 1966.

I would like to take this opportunity to thank you for the consideration and courtesy you showed us in finding time in your busy schedule to meet with us on Tuesday to discuss this important subject.

Very truly yours,

/s/J. W. Plaatje

J. W. Plaatje

UNITED STATES DISTRICT COURT

Exhibit 33

EASEMENT FOR UNDERGROUND UTILITIES

THIS DEED OF EASEMENT, made this 23rd day of April , 1980, between NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, a political subdivision of the Commonwealth of Virginia, hereinafter called the "Owner;" and VIRGINIA ELECTRIC AND POWER COMPANY, a Virginia corporation, hereinafter called "Grantee."

WITNESSETH THAT:

WHEREAS, the Owner will acquire, or already has acquired, upon closure and vacation of certain portions of Craig Street in the City of Norfolk, Virginia, legal title to portions of the streetbed

of the former Craig Street where said street abuts the Owner's real property; and

WHEREAS, it is necessary and appropriate for the Owner to convey to the Grantee certain underground utility easements to protect existing underground utility lines operated and maintained by the Grantee;

NOW THEREFORE, for and in consideration of the sum of One Dollar ($1.00) and other good and valuable consideration, receipt whereof is hereby acknowledged, the Owner hereby grants and conveys unto the Grantee, its successors and assigns, a nonexclusive easement and right-of-way to lay, construct, operate and maintain one or more lines for the transmission of electricity, as Grantee

may from time to time deem expedient or advisable, located in the rights-of-way hereinafter described, for electrical utility line purposes, together with such other underground equipment, accessories and appurtenances as the Grantee may from time to time require (hereinafter referred to as "facilities,") provided that all of the aforementioned facilities must be located underground, said easement and right-of-way to be upon, under, through and across certain property owned by the Owner and situated in the City of Norfolk, Virginia, described as follows:

> A permanent easement and right-of-way ten (10) feet in width in that portion of the former Craig Street closed and vacated by City Council of the City of Norfolk, said easement being in the former Craig Street, running from the southwestern street line of Berkley Avenue south-

westwardly to the northeastern street line of Mahone Avenue, and having as its centerline an imaginary line ten (10) feet northwest of the southeastern street line of the former Craig Street and parallel with said southeastern street line, said easement being shown on a plat entitled "Southside Boys' Club Subdivision," dated January 31, 1980, and recorded in the Clerk's Office of the Circuit Court of the City of Norfolk, Virginia, in Map Book 34 , at Page 131 .

The facilities constructed in the rights-of-way granted hereunder shall remain the property of the Grantee. The Grantee shall have the right to inspect, rebuild, remove, repair, improve, relocate within the rights-of-way described above, and make such changes, alterations, substitutions, additions to or extensions of its facilities so long as the facilities remain underground and within the

above-described rights-of-way, as Grantee may from time to time deem advisable.

Owner, its successors and assigns, reserves the right to use the land through which said easements and rights-of-way are granted for its own purposes, provided such use is not inconsistent with and does not interfere with the said easements and rights-of-way, and provided further that no building or permanent structure shall be constructed on, along or across said easements and rights-of-way. However, the Owner and its successors and assigns may install on the easements and rights-of-way fences, paving, sidewalks or benches.

The Grantee shall have the right to clear and keep cleared all trees, roots, brush and other natural obstructions from the surface and sub-surface of the

easements. The Grantee shall exercise its rights under this Deed of Easement in such manner as shall occasion the least inconvenience to Owner, its successors and assigns. The Grantee shall repair or pay for any damage to roads, sidewalks, fences or other property resulting from the construction, inspection, maintenance or operation of Grantee's facilities.

The Owner reserves the right to grant within the aforesaid easements and rights-of-way contiguous, coextensive or partially contiguous or coextensive easements for other public or non-public underground utilities, so long as the other contiguous or coextensive utility easements will not substantially interfere with the Grantee's use of the easements and rights-of-way granted herein.

This conveyance is made expressly subject to all conditions, restrictions and easements, if any, of record, constituting constructive notice.

IN WITNESS WHEREOF, Norfolk Redevelopment and Housing Authority has caused these presents to be executed in its name and on its behalf by Julian Rashkind, its Chairman, and its corporate seal to be hereunto affixed and attested by David H. Rice, its Secretary, as of the day and year first above written.

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY

By /s/Julian Rashkind
Chairman

Attest:

/s/David H. Rice
Secretary

STATE OF VIRGINIA

CITY OF NORFOLK, to-wit:

I, H. W. Martin, Jr., a Notary Public in and for the City aforesaid in the State of Virginia, whose commission expires on the 13th day of August, 1983, do hereby certify that Julian Rashkind, Chairman, and David H. Rice, Secretary, respectively, of Norfolk Redevelopment and Housing Authority, whose names are signed as such to the foregoing writing bearing date of the 23rd day of April , 1980, have acknowledged the same before me in my City and State.

Given under my hand this 23rd day of April , 1980.

/s/H. W. Martin, Jr.
Notary Public

UNITED STATES COURT OF APPEALS

Joint Appendix p. 151

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

PUBLIC SERVICE COMPANY OF OKALHOMA, an Oklahoma corporation,

Plaintiff,

vs.

PATRICIA ROBERTS HARRIS, Secretary of Housing and Urban Development, United States Department of Housing and Urban Development,

No. 79-C-37-BT

AND

BROCK ADAMS, Secretary of the Department of Transportation, United States Department of Transportation,

Defendants.

O R D E R

Plaintiff, Public Service Company of Oklahoma, brings this action seeking declaratory and injunctive relief based on the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §4601 et seq. ("URA"). In their answer, the defendant government agencies have moved to dismiss the complaint on a number of grounds. The legal issues have been briefed, and based upon the applicable law, the Court finds that this action should be dismissed.

In considering a motion to dismiss, the Court is to construe the complaint in the light most favorable to plaintiff, and the material allegations of the complaint must be taken as true. Jenkins v. McKeithen, 395 U.S. 411, 421-422; 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969). The test for

determining the sufficiency of a complaint is that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2 80 (1957).

The complaint alleges that plaintiff is a public utility under the laws of the State of Oklahoma; that plaintiff has been granted franchises in various cities and towns in the State which entitle it to use public streets, alleys and public places for the placement of its equipment; and that it has been required to relocate its facilities at its own expense because of various street construction or improvement projects funded in part by defendant

agencies.

It is plaintiff's position that federal agencies may not make grants or approve projects involving the use of federal funds unless the state first gives assurance that plaintiff's relocation costs will be reimbursed. In support of its position, plaintiff relies on the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§4601 et seq. ("URA"), and alleges that the URA abrogates the common law rule that a public utility required to relocate must do so at its own expense.

Defendant's grounds for its motion to dismiss are (1) that there has been no acquisition of a property interest and, therefore, plaintiff is not a displaced person under the URA and not eligible for

relocation payments; (2) failure of Public Service Company to exhaust its administrative remedies; (3) defendant Secretary of Transportation is precluded from authorizing the expenditure of funds for this utility relocation by 23 U.S.C. §123 and 69 O.S. §1403(c); (4) plaintiff's claim as it relates to future occurrences is premature; and (5) plaintiff has failed to plead violations of the URA by defendants. Because of the disposition of this case on the first two grounds enumerated above, it is unnecessary to discuss the others.

WHO ARE DISPLACED PERSONS UNDER THE ACT?

The Uniform Relocation Assistance Act, 42 U.S.C. §§4601 et seq., /provides that before a federal agency may approve a grant for federal assistance it must have

received satisfactory assurances from the State that fair and reasonable relocation payments and assistance will be provided to "displaced persons." 42 U.S.C. §4630(1). A "displaced person" is defined in 42 U.S.C. §4601(6) as:

[2]

> "any person who, on or after January 2, 1971, moves from real property, or moves his personal property from real property, as a result of the acquisition of such real property, in whole or in part, or as the result of the written order of the acquiring agency to vacate real property, for a program or project undertaken by a Federal agency, or with Federal financial assistance; and solely for the purposes of sections 4622(a) and (b) and 4625 of this title, as a result of the acquisition of or as the result of the written order of the acquiring agency to vacate other real property, on

> which such person conducts a business or farm operation, for such program or project."

A corporation may be a displaced person by virtue of 42 U.S.C. §4601(5).

It is clear from the language of the URA that the URA applies only when there has been an acquisition of real property as a result of governmental action for a federal or federally aided project. Alexander v. HUD, _____ U.S. _____, 99 S.Ct. 1572 (1979); Moorer v. HUD, 561 F2d 175 (8th Cir. 1977). Therefore, in order for Public Service Company to prevail, it must show that its franchise is a property right and that there has been an acquisition. Neither is present here.

A franchise is a right or privilege conferred by law. It is a "right granted

by the state or a municipality to an existing corporation or individual to do certain things which a corporation or individual otherwise cannot do." Oklahoma Gas and Electric Co. v. Total Energy, Inc., 499 P2d 917 (Okl.1972). A franchise has also been defined as a "privilege of doing that which does not belong to the citizens of the country generally by common right." State ex rel Williamson v. Garrison, 348 P2d 859. A franchise therefore grants the franchisee the privilege of using public property for private purposes, but does not grant an interest in the land itself.

It is plaintiff's contention that a franchise, once exercised, becomes a vested property right in the particular location which has been utilizied.

However, plaintiff cites no applicable case in support of its contention. Empire Natural Gas Co. v. Southwest Pipe Line Co., 25 F2d 742 (N.D. Okl. 1928), cited by

plaintiff involved a contractual right to lay pipeline on leased property and not a

[3]

franchise. Parlane Sportswear Company, Inc. v. Weinberger, 381 F.Supp. 410 (D.Mass.1974) involved a tenant at suffrance who was forced to move from privately owned property. Plaintiff's attempt to apply that situation by analogy to a franchisee is unpersuasive.

On the other hand, there is ample support for the Court's determination that a franchise is not a property interest. The

Oklahoma Constitution, Article 18 §7 provides that a franchise grant shall not divest the State or its subdivisions of their control and regulation over the use and enjoyment of public property. Further, Title 69, O.S. §1403 specifically provides that whenever a utility company is required to relocate its facilities, such relocation is to be at the expense of the utility company. Thus, there is no property right involved. Further, there is no acquisition. Plaintiff has not been divested of its franchise, but has only been told that it must relocate certain of its facilities. Plaintiff still has the right to use public property, even though it must shift its equipment to accommodate the State's use of its property.

Plaintiff contends that the URA abro-

gates the common law rule that a utility required to relocate must do so at its own expense. That argument must fall because, first, in Oklahoma the rule is statutory, and secondly because the URA, by its own terms, does not create any new property interests. 42 U.S.C. §4602. Unless Public Service Company has a property interest under State law, which is lost because of the acquisition, it can claim no benefits under the URA. This is supported as well by the provisions of 23 U.S.C. §123, part of the Federal Aid Highway Act, which provides that federal funds may be used to pay the cost of utility reimbursement only when the cost is first paid by the State and only when the payment does not violate State law. Given the provisions of Title 69 O.S. §1403,

such a reimbursement would obviously violate Oklahoma law. Nothing in the URA either expressly or impliedly overrules Title 23 O.S. §123. Artesian Water Company v. State Department of Highways & Transportation, 330 A2d 432 (Del.1974).

EXHAUSTION OF ADMINISTRATIVE REMEDIES.

Defendants assert that the complaint should be dismissed because plaintiff has failed to exhaust its administrative remedies. Plaintiff on the other hand argues that an administrative appeal would be futile. The Court agrees with defendants. Title 42 U.S.C. §4633 of the Act authorizes heads of federal agencies to establish regulations and procedures to assure

> "(3) that any person aggrieved by a determination as to eligibility for a payment authorized by this chapter, or

> the amount of a payment, may have his application reviewed by the head of the Federal agency having authority over the applicable program or project, or in the case of a program or project receiving Federal financial assistance, by the head of the State agency."

Such regulations and procedures have been established, at least by HUD. 24 C.F.R. §§ 42.220-42.290. These regulations provide for review by the appropriate State agency or by HUD or both.

Under the URA, the land acquisition policy of 42 U.S.C. §4651 is not subject to judicial review by virtue of 42 U.S.C. §4602(a). Other administrative action is reviewable under the Administrative Procedures Act, 5 U.S.C. §§701 et seq. United States v. 249.12 Acres of Land, 414 F.Supp. 933 (W.D. Okl. 1976). The APA, 5 U.S.C. §704 provides:

"Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. * * *"

Nowhere in the URA is there a statute making agency action reviewable. Therefore, before judicial review of an action may be had, administrative remedies must first be exhausted. When agency action is subject to appeal to higher administrative authority, that appeal must be pursued before judicial review is available. St. Regis Paper Co. v. Marshall, 591 F2d 612 (10th Cir. 1979); United States v. Carroll, 203 F.Supp. 423 (WD Ark.1962); United States v. 249.12 Acres of Land, supra.

While it is true that there may be

circumstances where exhaustion of administrative remedies is not required, none

[5]

of those circumstances has been shown to be present here. McKart v. United States, 395 U.S. 185 (1969); Martinez v. Richardson, 472 F2d 1121 (10th Cir. 1973); United States v. 249.12 Acres of Land, supra; St. Regis Paper Co. v. Marshall, supra.

For the foregoing reasons, the Court finds that this action should be dismissed for failure to state a claim upon which relief may be granted and for failure of plaintiff to exhaust its administrative remedies.

IT IS SO ORDERED.

DATED THIS 22nd day of August, 1980.

/s/Thomas R. Brett
THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

[6]

UNITED STATES COURT OF APPEALS

Joint Appendix P. 157

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

LONE STAR GAS COMPANY, a division of Enserch Corporation, a Texas corporation,	)	
Plaintiff,	)	
-vs-	)	No. 80-100-C
MOON LANDRIEU, et al.,	)	
Defendants.	)	

O R D E R

This matter comes before this court on a motion to dismiss, or in the alternative, a motion for summary judgment, of the defendant, Moon Landrieu, Secretary of Housing and Urban Development.

Plaintiff, Lone Star Gas Company, has

filed suit herein seeking judgment against three defendants, Moon Landrieu, Secretary of Housing and Urban Development; Neil Goldschmidt, Secretary of the Department of Transportation, and Hugo Community Development Agency. Plaintiff has since dismissed Department of Transportation as a defendant. In its complaint plaintiff has demanded payment of relocation costs alleging failure to pay constitutes breach of contract, and plaintiff seeks to hold Housing and Urban Development liable for this amount and to hold Hugo Community Development Agency liable for this same amount plus attorneys fees.

Plaintiff holds a franchise to supply the City of Hugo, Oklahoma, with natural gas, which grants the company:

> the right, privilege and franchise to

> construct, maintain and operate in the present and future streets, alleys, parkways and public places in the City of Hugo, a system of gas mains, supply pipes and laterals, with all necessary or desirable appurtenances for the purpose of supplying natural gas to the said City, the inhabitants thereof, and persons and corporations beyond the city limits, for light, heat, power and other purposes; and that the right, privilege and franchise herein granted shall be and remain in Company, its successors and assigns, for a term of twenty-five (25) years from and after the date of the approval of this ordinance.

See Section 1 of Ordinance 510A of the City of Hugo, Oklahoma, adopted October 6, 1970.

The City of Hugo, Oklahoma, entered into a grant agreement with the Department of Housing and Urban Development whereby the City was to receive $719,000 to be spent in accordance with an approved program under Title I of the Housing and

Community Development Act of 1974. Some of these funds were to be spent on improvements to Fifth Street.

Fifth Street was being widened and paved. The street was already owned by the City. No land or easement was acquired by the City for this improvement. Before paving and widening Fifth Street, the City notified Lone Star that it must relocate its gas lines within Fifth Street already owned by the City.

On February 16, 1977, Peggy Kaley, Executive Director of Community Development, notified Lone Star to proceed with the relocation procedures. She stated that at that time it was her understanding that the costs of the relocating were the responsibility of the Community Development Agency.

On August 17, 1977, Peggy Kaley wrote Lone Star that the City was not responsible for the relocation costs, enclosing an opinion of the City Attorney, Bob Rabon, dated July 13, 1977, that both Public Service Company of Oklahoma and Lone Star Gas Company are legally responsible for the expense of relocating their lines on Fifth Street.

On August 24, 1977, Peggy Kaley wrote Billy Austin, Acting Director of HUD, Oklahoma City Area Office, to the attention of Dennis Youngblood, for an opinion whether utility relocation expenses could be paid out of CDBG funds.

Billy Austin replied to Peggy Kaley on August 31, 1977, that CDBG funds should not be used to pay the relocation costs since the City was apparently not under a

legal obligation to pay such expenses where utility lines were removed from a right-of-way.

On September 8, 1977, Peggy Kaley wrote W. D. Curtis of the plaintiff company concerning HUD's opinion expressed in Exhibit 6.

On September 30, 1977, Peggy Kaley wrote W. D. Curtis of the plaintiff company that Hugo Community Development had no authority to settle the question of relocation costs payment.

On November 4, 1977, George A. Willis, Manager of the plaintiff company, wrote Community Development requesting payment of relocation costs in the amount of $9,243.39.

On December 7, 1977, Peggy Kaley wrote W. D. Curtis of the plaintiff company that

Hugo City Council had voted to disallow payment of utility relocation costs on the 5th Street paving project.

On February 3, 1978, Bruce Westmoreland, apparently on behalf of plaintiff company (note the face of this letter does not mention Lone Star Gas Company), wrote the Community Development Agency that the sum of $9,243.39 was still due and owing.

On March 1, 1978, Peggy Kaley wrote to Bruce Westmoreland of the plaintiff company that the matter of relocation costs payment had been referred to the Lone Star legal department and requested him to check with them concerning payment.

The defendant City of Hugo allegedly denied liability for relocation costs under the Uniform Relocation Assistance

and Real Property Acquisition Act of 1970, 42 U.S.C. Section 4601 et seq. (hereafter referred to as URA). Plaintiff therefore seeks to enjoin Housing and Urban Development from continuing further projects in Hugo until plaintiff's costs are paid plus any other relief deemed proper by the court.

As a result of the Fifth Street paving project, plaintiff alleges that it was required to remove its gas lines at its own expense from part of its "easement," resulting in relinquishment of its right to part of the "easement." This allegedly constituted a taking of property without due process of law and without just compensation. Defendant has requested the production of said easement pursuant to Rule 34 of the Federal Rules of Civil

Procedure, and plaintiff has furnished it no easement but has provided the franchise attached to defendant's motion.

Defendant asserts that the complaint should be dismissed for failure to state a claim for which relief can be granted in that the plaintiff (1) has not alleged sufficient facts to establish a violation by defendants of the URA, (2) has not alleged sufficient facts to establish that it is entitled to relocation benefits under the URA, and (3) has failed to exhaust its administrative remedies under the URA. The court agrees with the defendant. Because of the disposition of this case on the first two grounds above, it is unnecessary to determine exhaustion of administrative remedies.

In considering a motion to dismiss the

court is to construe the complaint in the light most favorable to plaintiff, and the material allegations of the complaint must be taken as true. Jenkins v. McKeithen, 395 U.S. 411, 421-422; 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969). The test for determining the sufficiency of a complaint is that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

As pointed out by the defendant, the recent Northern District of Oklahoma case, Public Service Co. of Okla. v. Harris, et al., (N.D.Okla., 79-C-37-BT), is most similar to this case. The court concludes

that the well reasoned and written order of Judge Brett in that case is dispositive of this case.

As stated by Judge Brett in the Public Service case, supra:

> The Uniform Relocation Assistance Act, 42 U.S.C. Secs. 4601 et seq., provides that before a federal agency may approve a grant for federal assistance it must have received satisfactory assurances from the State that fair and reasonable relocation payments and assistance will be provided to "displaced persons." 42 U.S.C. Sec. 4630(1). A "displaced person" is defined in 42 U.S.C. Sec. 4601(6) as:
>
> > any person who, on or after January 2, 1971, moves from real property, or moves his personal property from real property, as a result of the acquisition of such real property, in whole or in part, or as the result of the written order of the acquiring agency to vacate real property, for a program or project undertaken by a Federal agency, or with Federal financial assistance; and solely for the purposes of sections 4622(a) and (b) and 4625 of this title, as a

> result of the acquisition of or as the result of the written order of the acquiring agency to vacate other real property, on which such person conducts a business or farm operation, for such program or project.

A corporation may be a displaced person by virtue of 42 U.S.C. Sec. 4601(5).

It is clear from the language of the URA that the URA applies only when there has been an acquisition of real property as a result of governmental action fr [sic] a federal or federally aided project. Alexander v. HUD, ____ U.S. ____, 99 S.Ct. 1572 (1979); Moorer v. HUD, 561 F.2d 175 (8th Cir. 1977). Therefore, in order for plaintiff to prevail, it must show that its franchise is a property right and that there has been an acquisition. Neither is present here.

A franchise is a right or privilege conferred by law. It is a "right granted by the state or a municipality to an existing corporation or individual to do certain things which a corporation or individual otherwise cannot do." Oklahoma Gas and Electric Co. v. Total Energy, Inc., 499 P.2d 917 (Okl. 1972). A franchise has also been defined as a "privilege of doing that which does not belong to the citizens of the country generally by

common right." State ex rel Williamson v. Garrison, 348 P.2d 859. A franchise therefore grants the franchisee the privilege of using public property for private purposes, but does not grant an interest in the land itself.

There is ample support for the Court's determination that a franchise is not a property interest. The Oklahoma Constitution, Article 18 Sec. 7 provides that a franchise grant shall not divest the State or its subdivisions of their control and regulation over the use and enjoyment of public property. Further, Title 69, O.S. Sec. 1403 specifically provides that whenever a utility company is required to relocate its facilities, such relocation is to be at the expense of the utility company. Thus, there is no property right involved. Further, there is no acquisition. Plaintiff has not been divested of its franchise, but has only been told that it must relocate certain of its facilities. Plaintiff still has the right to use public property, even though it must shift its equipment to accomodate the sovereign's use of its property.

Plaintiff contends that the URA abrogates the common law rule that a utility required to relocate must do so at its own expense. That argument must fall because, first, in Oklahoma the rule is statutory, and secondly

> because the URA, by its own terms, does not create any new property interests. 42 U.S.C. Sec. 4602. Unless plaintiff has a property interest under State law, which is lost because of the acquisition, it can claim no benefits under the URA.

Accordingly, defendant's motion to dismiss for failure to state a claim for which relief can be granted is sustained, and the complaint is dismissed in all respects.

It is so ordered this 30th day of March, 1981.

/s/Frank H. Seay
Frank H. Seay
United States District Judge